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In the Supreme Court of the United States

OCTOBER TERM, 1929

Original No. 12

STATE OF CONNECTICUT

v.

COMMONWEALTH OF MASSACHUSETTS

IN EQUITY

MOTION TO STRIKE OUT DEFENDANT'S ANSWER — MOTION TO STRIKE OUT PART OF THE DEFENDANT'S ANSWER.

BRIEF FOR THE COMPLAINANT

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In the
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OCTOBER TERM, 1929

Original No. 13

STATE OF CONNECTICUT

v.

COMMONWEALTH OF MASSACHUSETTS

IN EQUITY

BRIEF FOR THE COMPLAINANT IN SUPPORT OF

1 MOTION TO DISMISS DEFENDANT'S ANSWER
2 MOTION TO STRIKE OUT PART OF THE DEFENDANT'S ANSWER

PRELIMINARY STATEMENT RE MOTIONS

The two motions filed by the State of Connecticut, one a motion to dismiss the defendant's answer and the other a motion to strike out certain parts of the defendant's answer, are in the nature of demurrers to the answer as filed by the Commonwealth of Massachusetts. Both of these motions raise substantially the same questions, although in a different form. They are based on the proposition that, so far as a discussion of the questions of law involved in this case are concerned, certain facts alleged in the answer may be considered as admitted for the purpose of argument. This brief is not arranged so as to chronologically take up the several questions raised in these two motions, but rather to develop a logical argument from the beginning of the case to its end. As the different issues raised in the two motions apply to the subject discussed in the brief, attention will be called to those portions of the two motions which are pertinent.

GENERAL STATEMENT OF FACT

1. Interstate streams.
2. Diversion for a public use of Massachusetts.
3. Permanent diversion of waters.
4. Diversion from one watershed to another.
5. Diversion for no navigable purpose.
6. No permit obtainable from the federal government.
7. Justified on ground of necessity.
8. Comparative injury.

GENERAL STATEMENT OF FACT

This is an original bill in equity, filed by leave of the court, in which the State of Connecticut is the complainant, and seeks to prevent and enjoin the defendant, the Commonwealth of Massachusetts, from diverting waters from the Ware and Swift Rivers, and other rivers, all of which streams are tributaries of the Connecticut River.

The purpose of the proposed diversion is to take water from the watershed of the Connecticut River, by a system of tunnels and aqueducts, to another watershed, where it will be used to augment the supply of water for drinking and domestic purposes by the Metropolitan area comprising the city of Boston and other surrounding communities.

Massachusetts claims to act under the authority of the acts of the General Court of the Commonwealth of Massachusetts, Act of 1926, C. 375, and Act of 1927, C. 321, as set forth in the answer, pages 33 to 77.

The supply of water from the Ware and Swift Rivers, and from any other rivers which the Commission plans to take, is intended to furnish an adequate supply for a present population estimated at substantially 2,000,000. The population of the area included in the Metropolitan District so called is growing and, under normal conditions, will continue to grow to double the present population in about thirty years. Whatever the amount of water which the Commonwealth of Massachusetts plans to take under these two acts of the Great and General Court, it is considered by it, that it will be sufficient

to supply this demand, and will justify an expenditure of about $65,000,000.

The contemplated plans and the legislation enacted pertaining thereto have been under consideration for many years, and have been the subject of exhaustive study and survey by experts in water and sanitary engineering, who have made frequent reports on the situation and the problems involved. The enactments of the Great and General Court have all been predicated on these reports. (Answer, pages 16 and 17.)

The legislation on this subject is mandatory and requires that the Commission appointed thereunder "shall construct the works in substantial accordance with the plans and recommendations of the joint Board of Water Supply, needs and resources of the Commonwealth" as contained in its report to the General Court 1922, House Document 1550. Ware River Act, Answer 34. Swift River Act, Answer 50 and 51.

Many of the tributaries of the Connecticut River, including the Swift, Ware, Miller, Deerfield, Westfield and Quaboag Rivers, empty and discharge their respective waters either directly or in conjunction with the Chicopee River, into the Connecticut River; and contribute to maintain and preserve the flow of the said Connecticut River, a navigable river, which flows through a portion of the state of Connecticut, designated as the Connecticut Valley, from Springfield, Mass., to Saybrook, Conn., where it empties into Long Island Sound, an arm of the Atlantic Ocean. (Bill, pages 2, 3 and 7; Answer, pages 4, 5 and 11.)

The Commonwealth of Massachusetts threatens and intends, and has already expended large sums of money in making plans, preparing specifications, advertising for bids from con-

tractors, and doing all further acts and things usual and incident, to carry out its plans; and unless prevented from doing so will divert the waters from the tributaries of the Connecticut River herein described as the Swift River, the Ware River and other rivers from their natural flow into the Connecticut River, and convey said waters by means of conduits, aqueducts and tunnels from the watershed of the Connecticut River into the Wachusett Reservoir near the city of Worcester, in the Commonwealth of Massachusetts, in such manner that not any of the water so taken, diverted, carried away and discharged, will be again returned, discharged or released into the Connecticut River or into any portion of the watershed drained by the Connecticut River, or any of its tributaries, but will be taken away and lost forever as a part of the Connecticut River, and will be completely taken away from inland navigation. (Bill, pages 9 and 11; Answer, pages 15, 16 and 23.)

The United States is charged with the care and control of all navigable waters, and has delegated certain duties in connection with the care and control thereof to the War Department of the United States, all under acts of Congress in such case made and provided.

The action contemplated and now being carried into effect by the Commonwealth of Massachusetts requires that the plans should be first recommended and approved by the War Department and permission given to carry out such plans as have been submitted to and approved by the War Department. The Commonwealth of Massachusetts has not submitted plans to the War Department or obtained the approval of the War Department to any plans. (Bill, pages 3 and 4; Answer, page 6; Amended Answer, page 6.)

The War Department has not approved any plans and has not given permission to carry out the plans which the Com-

monwealth of Massachusetts has made for the purpose of taking away the water of the two rivers in question. (Amended Answer, filed November 4, 1929.)

The State of Connecticut and its citizens are without adequate relief or remedy at law for the injury which would result from the acts and conduct complained of; and unless restrained by injunction the Commonwealth of Massachusetts will proceed to carry out its plan and take water from the Connecticut River watershed, and not return the water so taken after it has been used, to the watershed from which it is originally taken. (Bill, page 13; Answer, page 23.)

Massachusetts sets up among other things:

(a) The existence of an emergency within Massachusetts which constitutes a justification for the proposed taking. (Answer, pages 16, 17, 23, 27 and 28.)

(b) That the waters to be taken fall within the territorial limits of the Commonwealth of Massachusetts and are subject to be taken by such Commonwealth, subject only to the right of the Federal Government to control and regulate navigable waters. (Answer, pages 19 and 20.)

(c) It denies that property or persons situated in the Connecticut Valley are injuriously affected by any of the acts complained of, and claims that only a small quantity of certain waters will be taken at present. (Answer, pages 9, 11, 12, 15, 19 and 29.)

(d) That the taking of the waters of the Ware River and of the Swift River has been definitely contemplated by the Commonwealth of Massachusetts for more than thirty years. (Answer, page 16.)

(e) That a comprehensive study of the water supply problem of the Metropolitan District of Boston has been going on for more than a century. (Answer, page 21.)

(f) That it proposes to proceed with the work because of the pressing emergency confronting the Commonwealth of Massachusetts with respect to providing a suitable supply of water for domestic purposes. (Answer, paragraph 20, page 23.)

(g) That the State of Connecticut or any of its citizens who may be damaged can recover any damages suffered by virtue of any diversion authorized by the Commonwealth of Massachusetts, by recourse to the courts of Massachusetts, and that therefore the State of Connecticut and its citizens have an adequate remedy at law. (Answer, paragraph 21, pages 24, 25, 28 and 29.)

(h) That serious injury will result to the citizens of Massachusetts if the diversion is prohibited.

(i) That the diversion is but a reasonable use of the waters of the Swift and Ware Rivers by the Commonwealth of Massachusetts.

(j) Laches.

(k) That all the acts done or contemplated to be done are in obedience to and in compliance with the provisions of enactments of the General Court of Massachusetts. (Answer, pages 16, 17, 18 and 19.)

II. CAPACITIES IN WHICH THE SUIT IS BROUGHT

1. As a sovereign.
2. As a lower riparian owner.
3. As parens patriae.
4. For the health and comfort of its citizens.

CAPACITIES IN WHICH SUIT IS BROUGHT

The State of Connecticut brings this action upon four grounds which have been approved by this court in a number of cases;

First, as a sovereign charged with maintaining the policies of its government in relation to its lands and flowing waters;

Second, as a riparian owner upon an interstate stream;

Third, as *parens patriae* having the responsibility for the guardianship and protection of its people both in general as to navigable waters and in particular as to a large proportion of its inhabitants who own rights in this interstate stream of the same character as does the state itself;

Fourth, for the protection of the health and comfort of its citizens, or a large proportion of them.

Missouri *v.* Illinois, 180 U. S., 208, 241; 200 U. S., 496, 519.
Kansas *v.* Colorado, 185 U. S., 125, 141; 206 U. S., 46, 80.
New York *v.* New Jersey, 256 U. S., 296, 302.
North Dakota *v.* Minnesota, 265 U. S., 365, 372.
Wisconsin *v.* Illinois, 278 U. S., 367-409.

It is conceded by the Commonwealth of Massachusetts (Brief, Massachusetts, page 49) that Connecticut has a standing, as *parens patriae,* to raise for the determination of this court issues with respect to this diversion and the right to sue in behalf of its own proprietary interests and the general welfare of its people.

III. RIGHTS OF SOVEREIGNTY

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1. *Sovereignties of United States and State of Connecticut*

There are two sovereigns or quasi sovereigns who have an interest as such in the waters of the Connecticut River flowing through the State of Connecticut; one, is the United States

under its power to regulate and control interstate and foreign commerce, and the other, the State of Connecticut.

In discussing rights to flowing waters, we will commence with the powers of the state as they existed originally; *second,* the delegation of power to the United States, its scope and limitations; and *third,* the powers which still remain in the State after such delegation.

2. *Distinction between ownership of land and use of water*

In discussing rights to flowing waters, one distinction must always be kept in mind. Water as such must be considered apart from the channel, bed and banks over, along or through which the water flows.

In the discussion of questions arising as to the use of water with the many purposes to which it is subject, this fundamental distinction is very often lost sight of.

As to water itself, whether of navigable or a non-navigable stream, there cannot be absolute ownership of the water. The only interest which any one soverign or subject has in the water is the right to the beneficial use of the water as it naturally flows. This right is an usufruct.

> Blackstone Com., Book 2 Page 18.
> 3 Kents Com., Page 439.
> Sweet *v.* State of New York, 129 N. Y., 316.

This right to the beneficial use of water is divided between a public use, jus publicum, and the right of the individual, or jus privatum. Each is dependent upon some sort of ownership in the bed and banks of the stream through which the water flows.

3. *State's right to adopt policy covering its waters*

One problem of a government having streams within its domain is to determine upon some policy as to the relative rights of the individuals who own property along the banks of the streams, because it is the ownership of the land through which the stream flows which determines the rights in water.

Massachusetts and Connecticut, two of our earliest states, substantially adopted the common law doctrine of the English government as to water rights.

On the other hand the western states, with a vast amount of arid land, decided that for the best interests of their states as a whole, a different doctrine should be established and an allocation of the waters made based upon priority of appropriation for use of the waters in the reclamation of arid lands.

It must be conceded that any state has the right to determine for itself which of these doctrines, in whole or in a modified form, is to be adopted as the law of that particular state. When taken—this action cannot be modified or changed by the United States or any power other than the State which determines the rule.

In *paragraph 2* of the *complainant's motion to strike out certain parts of the defendant's answer* (pages 6 to 8) portions of Defendant's Answer are quoted. These portions of the answer set forth; in substance that the State of Connecticut and its citizens are not entitled to the use of the flood waters of the Connecticut River as they are supplied through the tributaries, but only to some unknown portion of the waters which flow through the stream during the course of the year, called by the Commonwealth of Massachusetts "the normal flow of the stream"; and it is further claimed that the State of Connecticut and its citizens would be better off without these flood

waters, and that because they would be better off, and because they are not entitled to them, the Commonwealth of Massachusetts has the right to take them.

The complainant has moved to strike out these portions of the answer, because under the law of the two states, all persons having a right to the use of flowing waters are entitled to all of the water which naturally flows through the stream, whether it be at the time of flood or at the time of drought, or at some intermediate season of the year. In Connecticut our Supreme Court has specifically called attention to the rights of riparian owners to flood waters as such, while in Massachusetts the courts include the flood waters as part of the natural flow of the stream.

> Thompson *v.* New Haven Water Co., 86 Conn., 597.
> Nemasket Mills *v.* Taunton, 166 Mass., 540, 544.

The states and the citizens thereof, being entitled to all of the waters of the stream as they flow, it is for the states, through their legislative departments, to determine as a state policy if any portion of the waters of a stream, whether flood waters or not, is to be allowed to be taken for any other purpose than a riparian use.

Paragraph 10 (page 27-29) of the *complainant's motion to strike out certain parts of the defendant's answer* (page 30) includes a quotation from the defendant's answer, wherein it is alleged that the State of Connecticut, either as a sovereign, as *parens patriae*, or as a riparian owner, has no vested right to the waters of the Connecticut River or to any portion thereof above and beyond a reasonable flow within said river. As hereinbefore stated, the reasonable flow of any stream includes all of the water which naturally flows through it. It follows that the allegation that Connecticut has no interest or right in any waters beyond this point is meaningless and should be stricken out.

On the other hand, if it is meant by this paragraph that Connecticut and its citizens have no vested right in any of the waters of the stream, then this statement is so contrary to the rule of law obtaining in both the Commonwealth of Massachusetts and the State of Connecticut, under the common law doctrine of flowing waters, that it should be stricken out as an incorrect statement of the law obtaining in both states.

4. *State's right as to non-navigable streams*

The common law doctrine provides that the riparian owners own to the thread or middle of the stream and as such owners of riparian land are entitled to the water as it is wont to flow, undiminished as to quantity and unimpaired as to quality. As to the waters of these streams or the riparian lands which carry with them the beneficial use of the water, the state has no more interest than it has in any other property in the state owned by individuals.

> "The state has no ownership in any part of unnavigable streams, nor any control over them, except such as it has in all parts of its domain for governmental purposes".
>
> (See 40 Cyc., 558;
> Home for Aged Women *v.* Commonwealth, 202 Mass., 422.)

This governmental purpose is the right to take property for a public use by the exercise of the power of eminent domain and it is only in this way that the soverign can acquire for itself or for any one else the property rights in riparian lands and the use of water flowing through them.

5. *Original power of states as to navigable streams*

The original states of the Union secured their governmental powers from Great Britain in two successive ways. *First,* by

grant of royal charters, and *second*, as a result of the Revolutionary War. The sovereignty secured by charter was not an absolute one so far as navigable waters were concerned. The powers of the Crown had been limited by the provisions of *magna charta* and subsequent rights conceded to the people. The powers of the government as such and the superior conceded rights of the individuals comprising that government were differentiated. The life of the government was predicated upon the due respect and jealous safeguarding of the rights to which the people were entitled. Judge Koonce, O. C. E., in his lecture at the Engineer School at Fort Humphreys, Virginia, April 23, 1926, expressed the powers of the Crown as follows:

> "Thereafter, title to the land and water in the space between high water mark on each side of the river was vested in the King merely as a prerogative right incident to the power of government, and was held by him in trust for the public easement, or rights of navigation and fishery, the power to regulate and control which was vested in Parliament as representing the people. Upon the settlement of the American Colonies these rights passed to the grantees in royal charters in trust for the communities established."

To this might also be added the obligation of the Crown to recognize and protect the right of riparian ownership in the individuals along the streams. The colonies succeeded to both the powers of the Crown and of Parliament. In their set-up of government, the Colonies also differentiated these powers but in a substantially different manner. To the legislatures were given the powers of the Crown, but the powers reserved to the people were not entrusted to any representative body, but reserved for their own determination and control. Hence the so-called Bill of Rights which is a part of the several state constitutions and which appears as a part of the constitution of the United States. It is a most significant fact that it was by the assurance of the passage of the first ten amendments

to the Federal Constitution which set forth these rights, that it was possible to secure the adoption of the Constitution as originally prepared. It was not enough for the colonies or states to be assured that these rights were inherent; they demanded and secured a positive declaration to that effect.

The successful conclusion of the Revolutionary War transferred to the several colonies all of the powers and prerogatives of the English Government.

1 Farnham on Water and Water Rights, page 47, sec. 9.
27 R. C. L., 1371 and cases cited.
Pollard *v.* Hagan, 3 How, 212.
St. Anthony Falls Co. *v.* St. Paul, 168 U. S., 360.
Shively *v.* Bowlby, 152 U. S., 1.
Johnson *v.* M'Intosh, 8 Wheat., 543, 595.
Martin *v.* Waddell, 16 Pet., 367, 408-410, 414.

The colonies' governmental interest in the waters of navigable streams assumed that of a trusteeship for the benefit of the people as a whole.

1 Farnham on Waters, page 533.
Mobile Tr. Co. *v.* City of Mobile, 187 U. S., 479.
27 R. C. L., 1371 and case.
Pollard *v.* Hagan, 3 How, 212.
Scott *v.* Lattig, 227 U. S., 229.
Donnell *v.* U. S., 228 U. S., 243.

As we have before indicated the State as a sovereign has no ownership in the water itself. There is, however, the right in the general public of the state, common to all of its people, to use the water of all streams where it is possible, for the purpose of navigation. If any stream is in fact susceptible of being used for the transportation of persons or the transportation of merchandise the water of such stream becomes charged with the use of the general public of that State for such purposes.

(a) *Ownership of bed and banks of stream:*

To insure this use for the benefit of all its people, the State, to this extent, holds the title to the land underneath such navigable water to high water mark on both sides of the stream. In addition to insuring the use of the water of these streams, designed by nature to furnish a means of water transportation, the title in the state also permits of the development of navigation by work upon the land lying underneath these waters. So that there is in the hands of the state the governmental function of maintaining the navigable streams which in fact are found to be navigable and their development for the purpose of navigation to their fullest extent, or to their navigable capacity.

This title which is in the state to land lying underneath navigable waters gives the state no proprietary interest in such lands. It is only a prerogative right to protect, preserve and develop navigation.

St. Anthony Falls Co. *v.* St. Paul, 168 U. S., 358-365.
Shively *v.* Bowlby, 152 U. S., I.

This right of navigation simply means that a method of transportation by water is a common right to all the citizens of the state. The title in the state is likened to the interest of the state in its land highways which is that of an easement.

Packer *v.* Bird, 137 U. S., 661, 667.
Grand Rapids Co. *v.* Butler, 159 U. S., 87.

(b) *Trusteeship for the public:*

The title which the state has in the land underneath the water of navigable streams is that of a trustee. It holds the land and incident to such title the use of the waters of such stream in trust for the benefit of the general public to use such

waters primarily for navigation. In other words, before any other interest in the use of such waters is to be exercised such use must be secondary to the public right of navigation and such use must be exercised in such a manner as to not destroy or seriously impair the public right of navigation. This title being in the state as a trustee for all of its people, it cannot be alienated without their consent.

Bradshaw *v.* Mill Co., 52 Minn., 59.
Vol. 3, Kent Com., 427.
Miller *v.* Mendenhall, 43 Minnesota, 95, 101, 104.

(c) *Individual rights:*

The same principle is true in the case of the individual as in the case of the state. There is likewise no individual ownership of running water. It is merely such rights as the individual may have to its beneficial use. These rights follow and are appurtenant to the ownership of the land over which the stream flows or the land adjoining the stream. These rights are known as riparian rights and the owners as riparian owners have the proprietary interests and the extent of these property rights are determined by the common law of the state in which the stream is located.

St. Anthony Falls Co. *v.* St. Paul, 168 U. S., 358-365.
Packer *v.* Bird, 137 U. S., 661, 667, 669-671.
Kaukauna Co. *v.* Green Bay Co., 142 U. S., 254, 272.
Hardin *v.* Jordan, 140 U. S., 371, 382.
Kansas *v.* Colorado, 206 U. S., 96, 97.
U. S. *v.* Rio Grande Irrigation Co., 174 U. S., 690, 704, 705.
Broder *v.* Water Co., 101 U. S., 274, 276.
Boquillas Land & Cattle Co. *v.* Curtis, 213 U. S., 339.

The States of Connecticut and Massachusetts are common law states and the common law rule as laid down by Chancellor Kent is as follows:

> "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run *(currere solebat)* without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him unless he has a prior right to divert it or a title to some exclusive enjoyment. He has no property in the water itself, but a simple *usufruct* as it passes along. *Aqua currit et debit currere et currere solebat* is the language of the law. Though he may use the water as it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate."

The uses which the riparian owners might make of the water as it passes by their land included the right to use a reasonable portion of it for domestic purposes, the right to bathe in the stream and the right to use the water for manufacturing purposes. This last right, however, was predicated upon compensating the riparian owners along the stream in the event that it was either held back from or flooded the land of other riparian owners.

All of these uses, which attach to the riparian lands, contemplated the substantial return of the water used to the stream for the further use by other riparian owners below. There was no right attached to any riparian owner to so divert the waters of the steam that the water would be permanently withdrawn from the stream and the lower owners forever deprived of the use of such water.

Riparian rights, attaching to non-navigable streams, are of primary importance because by the common laws of both Connecticut and Massachusetts, the riparian owners owned to the thread of the stream. In the case of navigable streams, as

we have already shown, the primary use of the water was for the common purposes of navigation. In such streams the use by the riparian owners, while it existed, was always subject to the common right of the general public to navigate the stream and the right of the state to improve the navigation of the stream. Yet subject to such rights, the riparian owners still possessed the same rights which they did upon non-navigable streams.

The rights in the riparian owners are vested rights of property, which under the constitution of the states, cannot be taken from them except for a public purpose of the state in which they are located, and in all cases by due process of law which must provide compensation be made for the property rights taken.

To sum up, the states, before the United States was formed, possessed certain title to the bed and banks between high water mark of all its navigable streams. As an incident to this title, the state was entitled to the use of the water flowing therein for navigation purposes. The state for the benefit of all of its people held this land in trust for its people, a trust which was not alienable. The trust consisted in the maintenance of navigation by all of its citizens of its navigable streams and the right to improve such navigation should it so desire.

(d) *Intrastate, interstate and foreign commerce:*

The state also had the right to regulate and control all commerce over these navigable streams between the state and other states and between the state and foreign land. The state also had the obligation and duty to only use the water in these streams for navigation purposes but to make certain that any surplus water not needed for navigation purposes should be at the disposal of the riparian owners for such beneficial use as they were entitled to.

6. *Delegated powers of the United States*

The framers of the Constitution of the United States recognized the restricted powers of the sovereign states, i. e., restricted as to each other, although unlimited within their own boundaries, and each state relinquished certain of its powers over the use of its navigable waters, by granting to the United States the power to regulate interstate commerce.

(a) *As to interstate and foreign commerce:*

As an incident to this power was the power to regulate, preserve and protect the navigability of the waters located within the several states for the use of the general public for interstate and foreign travel and commerce.

Under this delegated power, the United States acquired no title to the water, the bed nor the banks of navigable streams. Consequently, no power is lodged in any agency of the federal government to authorize directly or indirectly the taking away or diversion of any portion of the waters of navigable streams nor the disposition of any of the land under them. The waters may be used for some navigable purpose by or under the authority of the federal government but for no other purpose.

The powers vested in the United States have been repeatedly described as the duty to preserve and protect the navigability or navigable capacity of these instrumentalities of interstate and foreign commerce.

> United States *v.* Rio Grande Irr. Co., 174 U. S., 690.
> St. Anthonys Falls Co. *v.* St. Paul, 168 U. S., 349.
> The Montello, 20 Wall, 430.

This power has also been expressed as the power of "regulating and improving navigation".

Gibson *v.* U. S., 166 U. S., 269.
U. S. *v.* Chandler-Dunbar Co., 229 U. S., 53.
U. S. *v.* Cress, 243 U. S., 316.
McCready *v.* Virginia, 94 U. S., 391.
Illinois Central Railroad Co. *v.* Illinois, 146 U. S., 387.

Also as the protection and encouragement of interstate commerce.

1 Farnham on Water & Water Rights, page 54, sec. 12.
Jolly *v.* Terre Haute Drawbridge Co., Fed. Cases, No. 7441.
Texas and P. R. Co. *v.* New Orleans, 40 Fed., 111.

"The authority is given to Congress for the purpose of aiding, and not destroying, navigation and commerce; so that, although authority over the stream is absolute in execution of the trust imposed upon it, whatever obstructions it authorizes must be for the purpose of improving the navigation of the stream, or of facilitating commerce."

1 Farnham on Waters & Water Rights, page 60, sec. 14.

(b) *Includes navigable stream and its tributaries:*

The Ware and Swift Rivers are tributaries of the Connecticut River, a navigable stream, and some of their waters are concededly essential to present navigability of the Connecticut. This being so, makes their waters "navigable waters of the United States."

The fact that the War Department has already assumed jurisdiction over these waters and is prepared to limit the proportionate part of these waters which it will allow to be diverted, is strong evidence that this Department considers them "navigable waters of the United States". Otherwise, the United States would have no jurisdiction over them.

Navigable water of the United States has been held to mean:

> "A river, or other waterway, constitutes a navigable water of the United States, within the meaning of the said Acts of Congress, when it forms, by itself or by uniting with other waters, a continuous highway over which trade and travel is or may be conducted between the states themselves, or between the states and foreign countries."
>
> The Daniel Ball, 10 Wall, 557.

It has also been defined to mean:

> "Such waters are those which form, in their ordinary condition, by themselves or in connection with others, highways over which commerce is, or may be carried on with other states or foreign nations in the customary modes in which such commerce is conducted on water."
>
> 1 Farnham on Water & Water Rights, 67, sec. 15.
> U. S. *v.* Burlington & H. County Ferry Co., 21 Fed., 332.
> The Montello, 11 Wall, 411.
> Willamet Iron Bridge Co. *v.* Hatch, 19 Fed., 347.
> Miller *v.* N. Y., 109 U. S., 385.
> Neaderhouser *v.* State, 28 Ind., 257.
> Hickok *v.* Hine, 23 Ohio State, 523.

From these definitions it is evident that the stream in question, of itself, may not be navigable, but if it contributes to other water so that a channel of commerce is afforded for trade and travel between states or within the states, the water then becomes "navigable water of the United States".

All the tributaries of a navigable stream are within the class designated by our Courts as "Navigable Waters", under the care and regulation of the United States as such.

This principle has been recognized by the War Department

in this case, where it has limited the diversion to be allowed from the stream.

The duty of the War Department is to protect and promote navigation—not to say how far it can be tampered with before injury results.

This principle has also been approved by the Supreme Court of the United States.

U. S. v. Rio Grande Irrigation Co., 174 U. S., 690.

(c) *Navigable capacity:*

A number of the cases involving the powers of the United States concerning navigable waters have mentioned the term "Navigable capacity". A distinction also appears in the Rivers and Harbors Act of 1899 between obstruction to navigable capacity, which can only be authorized by the affirmative act of Congress and navigability, which is to a considerable extent within powers of the Secretary of War acting on recommendation of the Chief of Engineers.

There is no certain definition of the term, "Navigable capacity". Although the terms have been employed together to a considerable extent, it hardly seems probable that the terms "navigable capacity" and "navigability" are synonomous.

One of the powers which the United States has always claimed and actually exercised for a great many years has been the power to improve the navigability of streams under its jurisdiction. So that a stream partially navigable in the first instance may be improved by the Government and become wholly navigable; or where a stream is navigable only a portion of the year, by the improvements made by the United States or by the states it may become navigable during the whole year. The

improvements authorized by Congress originally were confined largely to dredging and deepening the channels. Recently, studies have been made by the United States for the improvement of navigation by a control of the flow of the stream. The Government is now expending large sums of money in surveys, having as their objective the use or harnessing of the flood waters so as to improve the flow of the streams during dry periods and periods of injurious floods.

From this it seems that it is rather the potential or possible capacity for navigation which can be obtained by artificial improvements which should determine the navigable capacity of the stream rather than to say that the navigability as it exists should be the test.

As an example, if a stream be navigable for six months in the year, as nature has allocated the water, and not navigable during the other six months, but it should be found that by storing the surplus waters during the six months of plenty and permitting these stored waters to flow down the stream during the six months of drought, a continuous navigation of twelve months in the year could be obtained, it seems a reasonable claim that the navigable capacity of such a stream would be twelve months in the year instead of six months. In other words, navigable capacity is to be determined by the total amount of water available, so controlled as to provide the maximum of navigability.

The construction placed upon this provision by the Supreme Court of the United States in the recent case of *Wisconsin et al. v. Illinois and Sanitary District of Chicago* (278 U. S., 367) has been to place in the hands of the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination in the particular case of what constitutes an unreasonable obstruction. In that case it will be recalled that on two different

occasions the Secretary of War decided that the diversion of 4,167 cubic feet per second, 8,500 cubic feet per second respectively from the waters of Lake Michigan was not an unreasonable obstruction to navigable capacity. The Court, however, found that as insofar as the diversion authorized by the Secretary of War was not for a navigable pupose, that there was no authority in the Secretary of War to grant a permit for such diversion. The Court further stated (page 417):

> "The normal power of the Secretary of War under Section 10 of the Act of March 3, 1899, is to maintain the navigable capacity of Lake Michigan and not to restrict it or destroy it by diversions."

In other words, the diversion of water from any navigable stream for a purpose other than navigation is beyond the powers of the Secretary of War because of necessity it restricts navigable capacity.

The states having delegated to the United States the power to regulate and control interstate commerce, it necessarily follows that all the navigable water of the United States, which is susceptible to use for water transportation can be used by the United States to its fullest extent for navigable purposes. It may use the water within the same watershed, in the same stream or it may divert the waters or a portion of them from one stream into another; the only requirement is that some navigable purpose is to be served by this use of the water.

If the United States believes that the commerce will be best taken care of by the development of a new line of water transportation, it may use any navigable waters of the United States to bring this about.

Where, however, there is water in a non-navigable stream which has not been a contributor to the navigability of a

stream, the United States cannot obtain the use of this water except by the exercise of the power of eminent domain and the consequent payment of damage to the individual owners of the land bordering such non-navigable streams. This is a taking of private property for which the owner is entitled to compensation.

Cohen *v.* United States, 162 Fed., 364.

There is no ownership in the waters of any stream navigable or non-navigable in the United States. The most that the United States receives through the delegation of power to control interstate commerce is the use of the water to which the people of several states had in common to use such waters as a means of transportation and trade.

(d) *Trusteeship:*

To protect this common right before the adoption of the Constitution, the obligation to preserve and protect the common right of navigation and fishing in navigable water rested in the government of the states as trustees for the benefit of the general public.

By the adoption of the Constitution so far as these navigable waters were available or could be made available for any ~~state~~ interstate or foreign trade or travel the trusteeship to preserve and protect such water transportation was delegated to the United States and thereupon the United States became charged with the same trust which had been lodged in the states themselves. Such being the relationship between the United States government and the states, it is evident that neither the United States or any of its departments have the right to authorize, permit or allow any of the waters to be used or appropriated to any other use than that for which the trust is created.

(c) *Section 9, Rivers and Harbors Act, 1899:*

The Congress of the United States in drafting the Rivers and Harbors Act, approved March 3, 1899, has recognized the principles which we have thus far set forth in this brief in both sections 9 and 10 of that Act.

Section 9, so far as applicable to this case, provides as follows:

> "That it shall not be lawful to construct or commence the construction of any . . . dam . . . in any . . . *navigable river, or other navigable water* of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War."

The first requirement of this section is that a dam is to be constructed. There is nothing in this section which provides that the proposed dam shall in any way affect present navigation or navigable capacity. The only requirement is that it shall be a dam, and in this case it is conceded that a diversion dam is to be constructed in the Ware River and two dams for the impounding of water in the Swift River. This brings these ~~two~~ structures squarely within the terms of this section.

The second requirement is that the dam is to be constructed in any "navigable river, or other navigable water of the United States". For the purposes of this argument, it is conceded that the Ware and Swift Rivers are not "navigable rivers". So that to come within the terms of this section the waters of the Ware and Swift must be "other navigable water of the United States".

We have already discussed the meaning of the term "other navigable waters of the United States" under the heading (b)

where it is claimed that a navigable stream includes of necessity the waters of its tributaries. The action of the War Department as set forth in the amended answer filed by the Commonwealth of Massachusetts is based upon the fact that the dams to be erected in the Swift River will have an effect upon the present navigability of the Connecticut River unless the Commonwealth of Massachusetts provides for the release of more water than its legislation provides for; and it is conceded by the War Department that unless it does so there would be grounds for federal interference in the operation of these dams. The only theory upon which the War Department will have any jurisdiction in this matter is that the navigable waters of the United States are in some way being affected by the construction of these dams. The complainant claims that it is not within the province of the War Department to determine how far the Commonwealth of Massachusetts may interfere with the navigability of a stream where the interference is to be accomplished by the construction of a dam; that under this section of the Rivers and Harbors Act it is only by an act of Congress that a dam can be built in any waters which are navigable in themselves or which contribute to the navigability of a stream to which they are tributary.

In the *complainant's motion to dismiss the defendant's answer* it is claimed in *paragraphs 3 and 4* (page 6) and *paragraph 7* (page 7) that it does not appear in the answer that any act of Congress has been passed authorizing the construction of a diversion dam in the Ware River or any dams in the Swift River; that the waters of these two rivers, forming a part of the navigability of the Connecticut River, and being the waters of the United States, such fact must affirmatively appear in the answer, if it is intended on the part of the Commonwealth of Massachusetts to rely upon some federal authority for making a diversion of the waters of these two streams.

It is also claimed in the *third paragraph* of the *motion to dismiss the answer* (page 6) that the second portion of section nine of the Rivers and Harbors Act provides that plans for such structures must be submitted to and approved by the Chief of Engineers and the Secretary of War; and that nowhere does it appear that any plans have been submitted to or approved by either or both of these officers of the government. The complainant claims that until such action has been taken the Commonwealth of Massachusetts cannot set up any federal authorization for this diversion as a defense.

Under this section the questions as to whether it does or does not, or to what extent it may affect navigation, are left in the hands of Congress. All that the Chief of Engineers and the Secretary of War can do is to receive plans and approve them. The authority to allow the construction of the dams rests with Congress, and it is Congress alone which can authorize such construction.

Since the drafting of the motion to dismiss defendant's answers, and the motion to strike out part of the defendant's answer, the defendant has amended its answer by setting forth the action of the Secretary of War upon applications for permits which were filed by the defendant. Under this section of the law these amendments to the answer do not add to the defense, inasmuch as they show upon their face that Congress has never approved or authorized the construction of any diversion dam in the Ware River or any dams for impounding water in the Swift River.

It appears in *paragraph 8* of the *complainant's motion to strike out certain parts of the defendant's answer* (pages 20 to 24) that there are numerous allegations in the answer concerning activities which it is claimed may be performed by the officials of the federal government, but nowhere is there any statement showing that under the provisions of Section 9 of

the Rivers and Harbors Act of 1899 has Congress authorized the construction of any dams in either the Ware or the Swift Rivers; or that any plans have been submitted to or approved by either the Chief of Engineers or the Secretary of War. The complainant therefore asks that these immaterial and irrelevant allegations be stricken from the answer as they fail to show legal justification to make these diversions.

(f) *Section 10, Rivers and Harbors Act, 1899:*

Section 10 of the Rivers and Harbors Act of 1899 may be divided into three parts. The first sentence provides as follows:

> "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of the waters of the United States is hereby prohibited;"

Recognizing the principle that the total water in the watershed which contributes to the volume of water flowing through a navigable stream is the condition which must be preserved by the United States for the purpose of interstate and foreign commerce, Congress has reserved to itself the determination of what action it will take should the navigable capacity of the navigable stream be jeopardized. It has expressly withheld from its administrative officers, the Secretary of War and the Chief of Engineers, any power to authorize the disposal of any of these waters, or by agreed non-interfence or other means allow any of the waters which form a part of the navigable capacity of a stream to be removed therefrom. Such removal must not be permitted without an affirmative act of Congress.

If there is any distinction between the "navigable waters of the United States" as used in Section 9 and the term "waters of the United States" this section at least applies to the waters of the Ware and Swift Rivers if they have any "navigable capacity".

It seems fair reasoning to assume that any tributary of a navigable stream has some navigable capacity. Very few streams would supply sufficient water to be classed as navigable streams without the aid of tributaries. Consequently each tributary has a capacity and by furnishing its water makes possible the navigability of the main stream.

Therefore, it is logical to say that any interference with the flow of the tributary of a navigable stream is an obstruction to the navigable capacity of that stream, as well as the navigable capacity of the main stream.

This portion of section 2 of the Rivers and Harbors Act of 1899 originally provided that the creation of any obstruction not affirmatively authorized by law to the navigability and capacity of any of the waters of the United States was prohibited. Under this phraseology it was held that the authority of the state was sufficient to interfere with the navigable capacity of a navigable stream.

> U. S. *v.* Bellingham Bay Boom Co., 176 U. S., 211, Act of 1890.

It was this decision which was responsible for the change in the wording of the statute.

In *paragraph 5* (page 6) and *paragraph 8* (page 8) of the *complainant's motion to dismiss the defendant's answer* it is claimed by the complainant that nowhere in the answer does it appear that Congress has affirmatively authorized a diversion of the waters of the Ware and Swift Rivers, which are tributaries of the Connecticut River, a navigable stream. Inasmuch as the War Department has taken cognizance of these diversions, and has specifically found that the navigable capacity of the Connecticut River is affected by the proposed diversions, the complainant claims that it is necessary, if federal authority

is to be set up as a defense to this action, that the answer must show some affirmative act of Congress in order to constitute a valid defense to this action. This motion applies with equal force to the answer as amended, as there is nothing showing any affirmative act of Congress set up in the amended answer.

In *paragraph 8* of the *complainant's motion to strike out certain parts of the defendant's answer* (pages 20 to 24) there appear a number of quotations from the defendant's answer, in none of which is there any information that Congress has affirmatively authorized the proposed diversions from these two rivers. Therefore the quoted portions of the answer are immaterial and irrelevant as a defense to this action.

It is conceded that the second portion of section 10 has no application to this case. The third part, so far as it is applicable to this case, reads as follows:

> "And it shall not be lawful . . . . . in any manner to alter or modify . . . . . the capacity of . . . . . the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

It is the claim of the defendant that it is under this portion of section 10 that it filed its applications for permits to make these diversions, and that the action of the War Department as to the Ware and Swift Rivers, as set forth in the amendment to the answer, is sufficient authority, so far as the federal government is concerned, for them to proceed with the diversions.

Its purpose is to require a permit for work which will have to do with the widening or deepening or obstructing the channel of the stream, but not the diversion of water from the river. There is a considerable difference between the channel through

which water flows and the water flowing through the channel; but even if this part of section 10 did have any application, the proceedings set forth in the amendment to the defendant's answer, showing the action by the Chief of Engineers and the Secretary of War, do not come within the terms of this section. To have any effect, the work to be done must be recommended by the Chief of Engineers, and no recommendation by him appears in either the answer as originally filed or as amended; and the work must be authorized by the Secretary of War prior to the beginning of the same, and there is nothing in either of these documents showing that any work has been authorized by the Secretary of War.

In *paragraphs 6* (page 7) *and 9* (page 8) of the *motion to dismiss the defendant's answer,* the complainant claims that there is nothing in the answer or in the amendment to the answer which shows that any work affecting the capacity of any channel has ever been recommended by the Chief of Engineers or authorized by the Secretary of War, and that therefore no federal authority for these diversions can be predicated upon a compliance with section 10 of the Rivers and Harbors Act of 1899.

In *paragraph 8* (pages 20 to 24) of the *complainant's motion to strike out certain parts of the defendant's answer,* the complainant claims that in none of the quoted portions of the defendant's answer does it appear that the work proposed to be done has been recommended by the Chief of Engineers or authorized by the Secretary of War, as required by this section; and that therefore all reference to this section in the answer should be stricken out as immaterial and irrelevant.

(g) *Federal permits:*

In reference to *paragraph 2* (page 5) of the *motion to dismiss defendant's answer,* inasmuch as the defendant, in para-

graph 2 of its answer (page 4) acknowledged the superior power in the government of the United States to permit the diversion contemplated by the Commonwealth of Massachusetts, and set forth in paragraph 5 of their answer (pages 5 and 6) and that they had filed applications with the Secretary of War to make these diversions, but acknowledged in paragraph 5 (page 6) that no permits had been received from the War Department, that any claim of the power of the United States to permit the diversion was negatived by the fact that no permits had been obtained; and therefore that no possible defense was contained in their answer, upon the ground that no superior federal authority had authorized these proceedings.

In *paragraph 8* of the *motion to strike out certain parts of the defendant's answer* (pages 20-24) the complainant seeks to strike out these references to applications having been filed and to the powers and rights of the United States, inasmuch as no claim was made that actual authority had been received by the Commonwealth of Massachusetts from the federal government to make these diversions, and consequently it forms no part of an adequate defense.

Since the preparation of these two motions the answer has been amended by setting up certain actions of the War Departments as to both the Ware and Swift River diversions, but in neither one of these cases does it appear that any work or any construction or any diversion of water has been either recommended by the Chief of Engineers or approved by the Secretary of War. There is no provision of law which authorizes these two officers to do anything more than recommend and approve. Any other action upon their part is purely voluntary, outside the scope of their duty in the premises, and furnishes no authorization to the Commonwealth of Massachusetts to proceed with its diversion of these waters. So that the action requested in the two motions, denying the proposed defense as

a matter of law, and the striking out of those portions of the answer, either in the original or amended form, as to the activities of either the Commonwealth of Massachusetts or the War Department, should be granted as having no application to an adequate defense in this action.

7. *Reserved powers of states*

Of the several powers and duties in respect to waters which were possessed by the states prior to the adoption of the Constitution of the United States, only one was directly delegated to the federal government. That was the power to regulate and control interstate and foreign commerce. It is only when some interest connected with interstate or foreign commerce is involved that the United States or any of its departments has the authority to provide what shall be done concerning the waters of navigable streams.

The states reserved to themselves a title as trustee to the bed and shores of navigable streams to high water mark; the right to the use of the waters of all navigable streams for navigable purposes not inconsistent with their use for interstate and foreign commerce; as trustee to maintain, preserve and protect the rights of the public to navigate in all of these waters; and the guarantee of the vested rights of the riparian owners along the banks of these streams.

The rights of the several states and of the people under constitutions are guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. These provisions limit the exercise of all grants of power delegated to the United States, including the power to regulate and control interstate and foreign commerce.

U. S. *v.* Adair, 152 Fed., 737.
Adair *v.* U. S., 208 U. S., 161.
Wilson *v.* New, 243 U. S., 332.

So that the United States cannot in any way violate the rights of the people of Connecticut to have the use of all of the water contributing to the navigability of any stream used for such purpose until the navigability of the stream has been developed to its capacity. No more can the United States violate the vested property rights of riparian owners along such navigable stream to use all of the waters flowing in the stream whenever the purposes of navigation have been satisfied so long as such use is not an interference with navigation.

Under our constitution these rights of the people as a whole and of the riparian owners can only be protected through the action of the state in its sovereign capacity when these rights are attacked by another state or commonwealth. As to the people as a whole they can only be represented and their common rights protected by action of the state as trustee for them.

Thus the state is in duty bound to prevent any violation or impending violation of these rights of its citizens who are the beneficiaries of a public trust.

It is contended that if the War Department, through its Secretary of War and Chief of Engineers, has not the power to grant the applications of the Commonwealth and issue permits affirmatively authorizing the diversions sought, it is within their province to inform the applicant that the department will interpose no objection to the proposed diversions if the amount of water specified by them is all that is to be diverted. This was the action taken on the Ware River application.

If the applicant was a riparian owner upon these rivers and intended to use the water for a legitimate riparian use, this position might be sustained. The United States would then say, in effect, to a riparian owner so far as interstate commerce is concerned, your use will not at present interfere with the naviga-

tion on the Connecticut River and we will not object to your exercising your riparian rights to use it. In such a case, however, the riparian owner in using the water does so subject to the right of the United States to stop his user at any time that interstate or foreign commerce requires the return of that water to such use. Besides, his exercise of user is not exclusive and all others on the stream can use the same water for their own needs as riparian owners. There is no complete withdrawal of the waters from the stream. They are returned, after his wants are satisfied, to the stream for the common use of all others below him on the stream.

This is not the situation in the present case. Here the use by the Commonwealth of Massachusetts withdraws the waters entirely from the stream and their subsequent use by other riparian owners. The United States in this instance is not releasing to someone who has a proprietary right to use these waters but to some one who has no proprietary title in their use. They are not released by the United States for a riparian use. They are not released for a purpose connected with navigation.

The United States has nothing to give in the way of title to these waters and release of the waters from the easement of use for purposes of interstate and foreign commerce immediately tends to divest the states through which the stream flows and the riparian owners of their respective rights in the use of those waters.

Such being the case there is no right in the United States to aid, assist, encourage or allow the use of these waters for a non-navigable purpose by someone who has no reversionary right to their use.

> Except as the owner of riparian lands and except for the purpose of regulating interstate commerce, the

> United States has no property in or sovereignity over the streams or watercourses within the boundaries of the several states. The sovereignity and ultimate control is in the state or in the riparian owner, or in both, according to the constitutions and laws of the several states, and the power of the Federal Government over the streams is no greater in the so-called public land states than in the states east of the Mississippi River.
>
> Kansas *v.* Colorado, 206 U. S., 92.

When the War Department issues a permit it is careful to protect both the rights of the states and the rights of individuals. There appears in each permit the following language:

> "NOTE—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State or local laws or regulations, nor does it obviate the necessity of obtaining *State assent* to the work authorized. *It merely expresses the assent of the Federal Government so far as concerns the public rights of navigation.* (See *Cummings v. Chicago,* 188 U. S., 410.)"

These permits also contain the provision that they are revocable at the pleasure of the War Department when it is found that the interests of navigation require such revocations.

In the case of the Ware River no restrictions appear. The applicant was informed:

> "Referring to your application of November 30, 1927, for *federal authority* for the diversion of the flood waters of the Ware River for an additional supply for the Boston Metropolitan District, this office has been directed by the Chief of Engineers to inform you *that no objection will be interposed by the War Department* to the diversion of the flood waters of the Ware River exceeding 85,000,000 gallons per day for the period October 16 to June 15 each year." (Italics are ours.)

There is no provision that property rights must be respected, that the states through which the water flows must assent, nor that the objection can be recalled at any time. To say that this is not in effect a permit is rather begging the question. What greater latitude of action could have been extended to this applicant if the authorization had been positive rather than negative. It was merely effecting the same result in a different manner.

8. *Laches—Not applicable to sovereign*

In *paragraph 4* of the *motion to strike out certain parts of the defendant's answer* (pages 12-14) there appear several excerpts from the defendant's answer, wherein they undertake to say that for a century or more there have been exhaustive studies as to the water supply for the Commonwealth of Massachusetts, which studies have been printed in the form of public reports, accessible to the world, and that some of these reports have recommended the use of the Ware and Swift River waters for a water supply for the Metropolitan District of Boston; that the State of Connecticut made no protest during the course of these studies, nor during the period in which plans were being perfected by the Commonwealth of Massachusetts to arrange for these diversions; that the State of Connecticut did not appear before the Great and General Court of the Commonwealth of Massachusetts to make substantial opposition to the legislation; and that the State of Connecticut did not actually commence these proceedings until some overt act upon the part of the Commonwealth of Massachusetts took place in carrying out the plans for this diversion; and that these facts should prevent the State of Connecticut from securing an injunction, on the ground that it had slept upon its rights.

The fact that it took a century of effort and a great number of expert and exhaustive studies to finally determine that the Ware and Swift River waters were advisable to be taken for the

supply of Eastern Massachusetts, might be offered as some excuse why Connecticut should not be expected to believe that they would actually be taken until some overt act apprised them of the fact that the intensive period of study and investigations had ceased. It certainly would have been improper for the State of Connecticut to attempt to interfere with the Great and General Court of Massachusetts in the performance of its duty. As soon as the Commonwealth of Massachusetts actually undertook to carry out the provisions of the two legislative acts authorizing the taking of the waters of the Ware and Swift Rivers, the State of Connecticut proceeded in the only effective way possible, by an application to this Court for an injunction to restrain the diversion of these waters.

The doctrine of laches does not apply to sovereignty.

U. S. *v.* Beebe, 180 U. S., 343, 353.

It will be recalled that in the case of the Sanitary District of Chicago much stress was laid upon the fact that the Lake States delayed their proceedings to enjoin the development of diversion works for such a long period, and that in the interim there had been such a tremendous amount of money expended by the Sanitary District in the development of its works, that these facts should be sufficient for the denial of the relief sought by the Lake States; but this defense did not succeed either before the master or before this court.

Wisconsin v. The State of Illinois and the Sanitary District of Chicago, 278 U. S., 347.

9. *Damage need not be alleged*

In *paragraph 1* (page 5) and *paragraph 7* (pages 17-20) of the *complainant's motion to strike out certain parts of the defendant's answer,* we have set up a number of statements from the defendant's answer to the general effect that the taking of

the waters from the Ware and Swift Rivers will not cause any material damage to either the State of Connecticut or its citizens; and request that these portions of the answer be striken out as not applicable to any valid defense to this action. So far as the present subject under discussion is concerned—that is, rights of sovereignty—it seems unnecessary to more than state the proposition of law to show its existence. If a sovereign right is jeopardized, the question of whether there is any actual damage is immaterial. *Georgia v. Tennessee Copper Co.*, 206 U. S., 230. Even in the case of individuals, if a right is affected by the continued exercise by his neighbor of some inconsistent right, his valuable right may be lost and another acquire one superior to his. This has been held by our courts to be sufficient to warrant the interference by a court of equity to prevent the loss of the right and the acquiring of a new right at his expense. *Water Commissioners v. Perry*, 69 Conn., 461. *Wellington v. Rawson*, 231 Mass., 189. This principle is just as true as between sovereignties. It is especially significant in view of the claim of the Commonwealth of Massachusetts as to laches. If a person must wait until he is actually or substantially damaged before seeking to prevent another from exercising rights inconsistent with his own, by the time he gets ready to insist upon his rights they may be lost through his inaction.

IV. RIPARIAN RIGHTS

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Both the State of Connecticut and the Commonwealth of Massachusetts, since their inception, have in general always followed the common law doctrine concerning flowing waters.

1. *Use of water as an incident to ownership of land*

We have already discussed the general proposition that there is no ownership in flowing waters as such. The rights which pertain to flowing waters are wholly derived from the ownership of land along the banks of the stream through which the water flows. The ownership of these lands carries with it, as an incident of such ownership, the right to use, in common with all other riparian owners along the stream, these flowing waters for certain purposes. The use to be made of these waters by any one riparian owner must be of such a character as to be consistent with a like use by all other riparian owners.

King *v.* Tiffany, 9 Conn., 162, 168.
Pratt *v.* Lamson, 84 Mass., 275.
Moulton *v.* Newburyport Water Co., 137 Mass., 163.

2. *Such use as a vested property right*

The use of flowing waters, existing solely because it is an incident to ownership of real estate along the banks of the stream, constitutes such a right a vested property right. It is known as an usufruct. The right is a right in real estate.

Hollister *v.* Union Co., 9 Conn., 435, 443.
Johnson *v.* Jordan, 43 Mass., 234, 239.
Cary *v.* Daniels, 46 Mass., 236, 238.

3. *Includes flood waters*

The right to use the waters of a flowing stream is applicable to all the water which nature supplies in the stream. It is not limited to the amount of water which flows in the stream in any one season of the year or any one year or an average of a number of years. Whether it be during periods of low flow or periods of high flow, commonly known as flood water, or an intermediate flow, a riparian owner is entitled to use of all of them. In Connecticut flood waters occupy in its judicial decisions a class by themselves; and the Supreme Court of Connecticut has specifically said that a riparian owner is entitled to these flood waters to the same extent to which he is entitled to the use of any other flows of the stream.

Thompson *v.* New Haven Water Co., 86 Conn., 597.

In Massachusetts, while this distinction is not so marked, the courts have held that the flow of the stream to which riparian owners are entitled includes all of the waters flowing by nature, including the flood waters.

Nemasket Mills *v.* Taunton, 166 Mass., 540, 544.

4. *Extent of rights*

(a) *Unimpaired as to Quantity and uncontaminated as to Quality.*

The general rule of the common law states is that a riparian owner is entitled to the use of flowing waters as they are wont to flow; that these waters must come to him and must be released by him after use unimpaired as to quantity and uncontaminated as to quality.

King *v.* Tiffany, 9 Conn., 162.
Buddington *v.* Bradley, 10 Conn., 212.
Wadsworth *v.* Tillotson, 15 Conn., 365.

Agawam Canal Co. *v.* Edward, 36 Conn., 476.
Waterbury *v.* Platt Bros. Co., 76 Conn., 435.
Colburn *v.* Richards, 13 Mass., 422.
Anthony *v.* Lapham, 22 Mass., 175.
Johnson *v.* Jordan, 43 Mass., 234.
Elliott *v.* Fitchburg R. R. Co., 64 Mass., 191, 196.

(b) *Reasonable use:*

The rights of riparian owners to use the waters of a flowing stream are limited to such use as will permit of a like use by all other riparian owners along the stream. They include, as a right, the use of the water for watering his cattle, and for a domestic supply for his household, and to a limited extent for the irrigation of his land.

(c) *Use of municipal water supply a non-riparian use:*

The use of water for domestic purposes by a municipality, even where the municipality is a riparian owner, and located upon the banks of a flowing stream, has never been recognized in either the State of Connecticut or the Commonwealth of Massachusetts as a reasonable use of such waters. From the earliest times the right of a municipality to use the waters of flowing streams for such purposes has been granted by legislative acts, and provisions made for compensation to be paid by the municipalities to riparian owners along the stream.

Harding *v.* Stamford Water Co., 41 Conn., 91.
Moulton *v.* Newburyport Water Co., 137 Mass., 16[illegible]
Proprietors of Mills on Monatequot River *v.* Brai[illegible]
tree Water Supply Co., 149 Mass., 478, 486.
Stevens *v.* Worcester, 219 Mass., 128.

5. *Taking waters for non-riparian use must be by eminent domain.*

If any riparian owner desires to use flowing waters for purposes other than those usually considered a riparian use, he

must either acquire those rights to make such further use of the waters by securing deeds or grants from all other riparian owners having an equal right with him to their use, or else he must obtain from the state the power to take the rights of such other riparian owners. In order to acquire this right, the use which he intends to make of the waters must be a public use, for this is the only ground upon which the state can grant the right to take private property; and provision must also be made for the payment of just compensation. It is because the legislative department has recognized the public necessity of developing manufacturing and furnishing a water supply which is adequate to centers of population, that it has authorized, sometimes in specific instances and sometimes by general act, the taking of water for purposes of millwrights, manufacturing plants, and municipal water supply. This has all been accomplished through legislative act, authorizing the taking upon the payment of just compensation; and we can find no cases which authorize the use of water for these purposes without such legislative authority.

> Ætna Mills *v.* Brookline, 127 Mass., 69, 71, 72.
> Ætna Mills *v.* Waltham, 126 Mass., 422, 425.
> Lynfield *v.* Peabody, 219 Mass., 322.

In *paragraph 9* (pages 24-26), *paragraph 10* (pages 27-29) and *paragraph 12* (page 30) of the *complainant's motion to strike out certain parts of the defendant's answer,* there appear a number of allegations claiming that there is authority in the Commonwealth of Massachusetts to take the waters of the Ware and Swift Rivers for the purposes of a domestic water supply, because such use is a reasonable use under the laws of the State of Connecticut and of the Commonwealth of Massachusetts.

The complainant claims that the allegations should be stricken from the answer because they do not set forth the true

rule obtaining in these two states as to the use of flowing water, even though it was intended by Massachusetts to use these waters in a municipality located upon the banks of the stream involved. The defendant has atempted to justify its claims as to reasonable use by a discussion of the principles involved, in its brief on these two motions (pages 42-46).

We cannot quarrel with the general statement that each riparian owner is entitled to a reasonable and just use of the water on its course through his land; and the cases cited are ample to sustain the general proposition; but an examination of all the cases cited fails to disclose any one of them in which the use of water for a domestic supply of a municipality has been sustained. Perhaps the nearest approach to this question is the case of *Stratton v. Mt. Hermon Boys' School,* 216 Mass., 83, 85, in which the waters of a stream, without legislative act, were diverted for the purpose of supplying a boys' school with water. Of course this school would consume much less water than any ordinary town or city, and its use was probably necessary for the satisfactory maintenance of the institution; but the court found that such use was not a reasonable one and awarded substantial compensation to the plaintiff.

6. *Damage need not be alleged or proved*

In a case where there is an invasion of right, as distinguished from damages cause by the exercise of a legal right, the courts have uniformly held in Connecticut and Massachusetts that the question of damage was included in the violation of the right; and that therefore it is unnecessary to allege specific damage in order to seek relief against the invasion of right in a court of equity.

Water Commissioners *v.* Perry, 69 Conn., 461.
Wellington *v.* Rawson, 231 Mass., 189.

In *paragraph* 1 (pages 5-6) and *paragraph* 7 (pages 17-20) of the *complainant's motion to strike out certain parts of the defendant's answer,* there appear quotations from defendant's answer wherein it is claimed that the complainant's action should fail because there will be no material damage caused to the complainant when this diversion is actually effected. The complainant has already shown that its rights as a sovereign and the rights of its citizens will be injured if the defendant is permitted to divert the waters of the streams in question from one watershed into another, and thus deprive Connecticut and its citizens from any use whatever of the waters so diverted. This diversion being admitted by the answer, it is the complainant's claim that upon the record as it now stands there appears an injury to the complainant for which it is entitled to relief in this court as a court of equity. The question of the degree of actual damage which will be caused by the diversion has no application. If the injury exists it should be corrected, and the question of damage or the amount of damage is not material to the case. Therefore the complainant requests that the portions of the answer set forth in those paragraphs be stricken from the record.

V. PARENS PATRIAE

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One of the grounds which has been recognized as the basis for state action in controversies arising between states has been the relationship of the state to its people as the guardian of the interests of the whole people or of a large proportion of the people. This duty devolving upon a state arises in some

measure from the situation in which the people of a state find themselves when their property interests are jeopardized by the action of a neighboring state.

1. *Individual cannot sue the state*

While origanlly, under the United States Constitution, it was permissible for a citizen of one state to sue another state where he had been wronged or alleged that he had been wronged by the action of such other state, by an amendment to the constitution (Article XI Amendment to Constitution) this right was taken from the individual; so that at the present time, no matter how many individuals in Connecticut may feel that they have been wronged, or their property rights jeopardized by the action of the State of Massachusetts, they are precluded from attacking the action of the Commonwealth of Massachusetts, because of this constitutional provision. Consequently, the only way in which their rights can be protected is by an action in their behalf by their own sovereign. So that one of the reasons why Connecticut brings this action is because a large proportion of her inhabitants, who are riparian owners upon the Connecticut River, are without remedy except as the State of Connecticut may protect their interests.

2. *Due process of law*

Under the Constitution of Connecticut (article I, sec. 9) the state of Connecticut has guaranteed to its citizens that their property rights shall only be taken from them by due process of law. Due process of law, in the case of an individual owning property or some property rights, means that his property cannot be taken from him for a public use except by the exercise of the sovereign power of eminent domain. So far as the state of Connecticut is concerned, the property owner is

secure in the possession of his property or his property rights, against their being taken in whole or in part, by his own sovereign, except the sovereign acts through its legislative power. He has no protection against the taking of his property or his property rights, by another state, except as the State of Connecticut intervenes in his behalf. If the State of Connecticut is to give effect to this constitutional guarantee, that the property of its citizens shall not be taken for public use except by a valid legislative act of a competent sovereign, then it is its duty, as the guardian of the rights of its people, to proceed against any state which may undertake to exercise this power over the property or property rights of its citizens. Otherwise it cannot successfully carry out its constitutional guarantee to its citizens.

As a further guarantee to the people of the several states, the *fourteenth amendment to the Constitution of the United States* provides.

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any citizen of . . . . property without due process of law."

Under this provision of the constitution, the State of Connecticut is charged with protecting its citizens from any law which will deprive them of their property without due process of law. We do not believe that it was the intention of this constitutional provision to limit the responsibilities and obligations of a state to securing its citizens in the protection of their property as against itself alone. To furnish adequate protection to all of its citizens, it is equally essential that the state protect its citizens against a neighboring state which may seek to take the property of a citizen of the former state without authority therefor and without due process of law.

3. *Equal protection of the law*

The *fourteenth amendment to the Constitution of the United States* also provides that "No state shall deny to any person within its jurisdiction equal protection of the law". As already suggested, as between the individual citizens of Connecticut and the state, he is protected as to his property or his property rights against any taking of the whole or any part of these rights except by the State of Connecticut, for public use, through the exercise of the power of eminent domain. This means, by the exercise of this power, by a sovereign of competent jurisdiction to whom he owes allegiance. If the State of Connecticut is to provide equal protection of the law, it must means that this security of property rights must extend to all of its citizens. If it is possible that a portion of its citizens are protected against action by the State of Connecticut, and another portion of its citizens is to be deprived of this protection because of the fact that another state can take these property rights from its citizens without the exercise of the power of eminent domain, then it is impossible for the state to provide equal protection of the law for its citizens. In the one case the property right may be taken only through the exercise of the power of eminent domain, and in the other it may be taken without the exercise of this power. Suppose, for instance, that a citizen of Connecticut is a riparian owner on a navigable stream wholly within the confines of Connecticut, and another citizen is a riparian owner on a stream which is an interstate stream: both are riparian owners; both are entitled to the same rights of property. In the first instance the riparian owner is secure in his property rights until the State of Connecticut sees fit to taken them for a public use; in the second case, if the State of Connecticut is going to apply the doctrine of equal protection of the law, his rights cannot be taken until the State of Connecticut sees fit to take it for a public use. Otherwise the state is not in a position to apply the equality of the law to the two riparian owners, although both have the same rights.

4. *Trusteeship for navigation, fishing and hunting*

We have already discussed to a considerable extent the right of the public in the navigable streams of the state to use them for commercial purposes, and also to use the waters for fishing and hunting. The theory upon which the state owns the bed and banks of a stream to either high or low water mark is that they own this property and the use of the waters flowing over it, for public purposes. There is no proprietary interest in this land or the waters, in the state. They are simply held by the state as trustee for the public. As trustee the state is without any power of alienation.

This being so, it is the duty of the state, as the guardian of all its people, to protect this trust. Any diminution of the waters which in any way affects their use for any public purpose, either as they now exist or as they are susceptible of development for any public use, is an injury to the general public.

VI. HEALTH AND COMFORT OF THE CITIZENS

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1. *Pollution of the stream*

It is the duty of the state to secure to its citizens the waters of a stream uncontaminated as to quality. While there is some authority to the effect that the waters of a flowing stream may be used for diluting sewage and industrial waste of communities, there is no right on the part of any riparian owner to so use the waters of a stream that they become contaminated to the injury

of other users of the stream, either above or below them. As pollution of a stream approaches a point where the waters become injurious to public health by reason of the odor or danger to the health of the citizens who have occasion to bathe therein, it is the duty of the state to intervene in their behalf.

2. *Fish life*

One of the duties of the state is to preserve and protect its navigable waters for the general right of the public to fish in these streams. Like navigation, this duty upon the part of the state is as a trustee for the general public; and as such trustee it is the duty of the state, whenever in its opinion a proposed diminution in the flow of the stream is threatened, or the stream is becoming contaminated to such an extent as to affect fish life, to proceed against those responsible for such conditions.

3. *Recreation*

To some extent the state has always considered that an opportunity should be afforded its citizens for proper recreation; and this has been one ground upon which the state has secured to the public the use of its flowing waters and large tracts of land. It is considered in all states and by the United States as a proper subject for public use; and the authority of the state and of the United States is used constantly to take for the public purpose of recreation lands and rights in land for the general public. Anything which, in the opinion of the state, is inimical to this public use of an interstate stream, is a sufficient reason for it to proceed for its protection.

VII. EMINENT DOMAIN

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1. *Taking—A legislative function*

The exercise of the power of eminent domain is not a granted power under any constitution. It is an inherent power of sovereignty. The state or the United States, for any public purpose, has the inherent power to take the property of its citizens. The determination of what property shall be taken, and the amount of the property to be taken, is a purely legislative function of government. The only restriction upon this power is that the purpose for which the property is taken shall be a public purpose. So long as the purpose is a public purpose, the courts or the judicial power of the government have no jurisdiction to review the action of the legislative department in authorizing the taking or the determination of whether or not the taking is necessary.

Rindge Co. *v.* County of Los Angeles, 262 U. S. 700.

2. *Compensation is a judicial function*

As contrasted with the taking, all of the constitutions provide that private property shall not be taken for public purposes without compensation. This constitutional provision confers upon the judiciary the determination of whether or not the compensation provided by the legislative enactment is a just

compensation. It also clothes the judiciary with the power of preventing the taking of private property for public use without any provisions for compensation.

Seaboard Air Line Railroad *v.* U. S., 261 U. S. 299.

3. *A legal taking and compensation must exist to be constitutional*

Unless there is a taking of property authorized by some legislative department of government competent to act, and a provision made for just compensation for the property taken, it is impossible to acquire property for public use. Both elements must exist to constitute a proper exercise of the power of eminent domain.

4. *Condemnation limited by state boundaries*

Any state undertaking to exercise the power of eminent domain by legislative act is limited in the extent of its authority to its boundaries. No state has the authority to exercise this power over property or property rights located in another state. The only legislative act which is depended upon as authority for the taking of any riparian rights within the state of Connecticut are the two acts passed by the Great and General Court of the Commonwealth of Massachusetts, known as Chapter 375 of the Acts of 1926, relating to the Ware River, and Chapter 326 of the Acts of 1927, relating to the Swift River.

Kansas *v.* Colo., 206 U. S. 46.

In *paragraph 10* (page 8) and *paragraph 15* (page 10) of the *complainant's motion to dismiss the defendant's answer,* it is claimed that insofar as the answer undertakes to set up acts of the Great and General Court of the Commonwealth of Massachusets which authorize the taking of the waters of the Ware and Swift Rivers, and other streams in connection there-

with, they are void and furnish no legal authority for such taking. The rights of the State of Connecticut and its citizens in the use of the waters of the Ware and Swift Rivers, as they flow into and through the Connecticut River, are property rights existing within the State of Connecticut. When the Commonwealth of Massachusetts undertakes to deprive these owners of their rights in these waters, it is not taking property rights which are located within the Commonwealth of Massachusetts, but property rights which are situated beyond its borders. These acts of the Commonwealth of Massachusetts speak only within the borders of that commonwealth; and insofar as they are depended on for authority to take property located within the State of Connecticut, they are void and furnish no adequate defense to this action.

In *paragraph 6* (pages 14-17) of the *complainant's motion to strike out certain parts of the defendant's answer*, there appear excerpts from the answer setting out the legislative acts of the Great and General Court of the Commonwealth of Massachusetts, as justification for the proposed taking of the waters of the Ware and Swift Rivers. The complainant complains that, because these acts are not sufficient in law, to authorize the taking thereunder of property located within the state of Connecticut, that the allegations furnish no defense to this action and should be stricken out.

5. *Powers of the United States*

There is no provision in the Constitution which delegates to the Congress of the United States the power to authorize the taking of property of one state by another state. The United States is limited in its exercise of the power of eminent domain to those purposes which are specifically delegated by the Constitution to it; and there is nothing in the Constitution which permits or authorizes the taking of property from one state by

the United States and giving it to another state. Nor is there any power delegated under the Constitution to the judicial department of the United States to authorize a taking of property in one state by the legislative act of another state.

Kansas *v.* Colo., 206 U. S., 46.

6. *No sovereign power exists to authorize taking*

The Commonwealth of Massachusetts, having no authority through its Great and General Court to authorize the taking of property located in Connecticut, and no authority residing in the legislative department of the United States to authorize one state to take property situated in another state, there exists no legislative power which can authorize the taking of this property unless it be that the State of Connecticut might authorize the taking of the property of its citizens for a public use in the Commonwealth of Massachusetts.

In *paragraph 12* (page 9) and *paragraph 14* (pages 9-10) of the *complainant's motion to dismiss the defendant's answer,* it is claimed that, because no sovereign power exists to authorize the taking by the Commonwealth of Massachusetts of property located within the State of Connecticut, insofar as the answer undertakes to set up any legislative authority for the diversion of the waters in question, it is not a defense which has any legal basis and should be stricken from the record.

8 Harvard Law Rev., 138.
New York City *v.* Pine, 185 U. S., 93.

7. *Sovereign cannot be forced to accept compensation*

The claim is made that by the acts of the Commonwealth of Massachusetts a provision is made for an award of compensation to be made by the courts of the commonwealth, when the citizens of another state desire to have this question considered by the courts of the Commonwealth of Massachusetts. Whatever effect this might have in the case of individual citizens,

it certainly can have no effect as far as the State of Connecticut is concerned. One state has no right, by legislative enactment to force another sovereign state to accept damages for any injury to its sovereign rights. Such a doctrine would deny the fundamental principles of sovereignty.

> "It is not lightly to be required to give up *quasi* sovereign rights for pay; and apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped."
>
> Georgia *v.* Tennessee Copper Co., 206 U. S., 230, 237.

8. *Effect of provision for citizens of one state to come into another and seek damages in the Courts of another state.*

The defendant sets forth on pages 24 and 25 of the answer that, under the two acts in question, of the great and general court of the Commonwealth of Massachusetts, there is a provision:

> "The owner of any real estate, whether within or without the Commonwealth which is not taken but is injured by the taking of the waters of Ware River under authority of this act, or by the construction of the works incidental thereto, shall be entitled to damages therefor and may recover the same from the Commonwealth as in the case of a taking in accordance with the provisions of this act." (Page 38 defendant's answer).

The case of *Manville Co. v. The City of Worcester, 138, Mass., page 89,* is quoted on page 25 of the defendant's answer as apparent authority for the proposition that so long as this provision is contained in the act of the Commonwealth of Massachusetts, it is sufficient to justify the taking of water rights located outside of that Commonwealth.

The property right in Connecticut is injured by an act committed in Massachusetts. The damage occurs in Connecticut; the act that occasioned the damage was done in Massachusetts. Massachusetts sets up the claim that the injured citizen, resident of a sister state, is given an opportunity to resort to the Massachusetts courts to cover damages. His remedy is limited to that set forth in the statute. He must bring his action in the state courts. The Commonwealth of Massachusetts can not force a non-resident owner to come into its courts to redress his damage in contravention to its constitutional provisions and the jurisdiction of the federal courts.

8 Harvard Law Review 138.

VIII. NECESSITY

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1. *Necessity of a sovereign with jurisdiction to take for its own public use.*

Where a sovereign, within its own territory, desires to take property for public use, its determination, through its legislative department, of the necessity for the taking is conclusive upon all other departments of government. Practically, a determination that the use to which the property is to be put is a public use is all that is necessary. Where such a condition exists, the statement by the legislative department that the taking is necessary is accepted by the other deparments wihout review. This court has held that the determination of the necessity is a purely legislative matter and is not the subject of review by the court.

U. S. *v.* Chandler Dunbar Co., 229 U. S. 53, 64.

2. *The determination of necessity is not a justiceable issue before the Supreme Court of the United States in a suit between states*

Inasmuch as this court has held that the determination of the question of necessity, where a sovereign acts within its unquestioned power, it not reviewable, there is more reason to claim that, in the absence of any authorized legislative act, this court cannot substitute necessity for a legislative act. If the question of necessity for the taking of private property for public use is so far a legislative power that it cannot be reviewed by the judicial department, then it must follow that the judicial department, of its own motion, cannot substitute necessity for such legislative act.

3. *Meaning of term "Necessity"*

Inasmuch as the Commonwealth of Massachusetts is without the power of eminent domain to take property located in the state of Connecticut, the allegations of necessity and emergency for additional water supply must be intended as justifying a modification or change in the general rule relating to the taking of property. It must necessarily mean that where a state desires property or property rights located within another state, which it has no power to take under its sovereign rights of eminent domain, if the emergency or necessity is great enough, this will justify the court in authorizing or assenting to the taking of the property without the exercise of the power of eminent domain.

The first question to arise in discussing such a theory is the character of the necessity or emergency which will justify such a revolutionary principle of law. We do not believe that even the defendants would claim that the mere pronouncement by the great and general court of the Commonwealth of Massachusetts that a necessity or emergency exists is the true rule to follow.

If such a claim, which we do not admit to exist, is to be considered, the complainant contends that the necessity or emergency must be an absolute one. Where to draw the line between these two extremes would present a most difficult problem. It is a question, however, on which any master, charged with a determination of the facts and the law applicable thereto, would undoubtedly welcome some indication as to the degree of necessity or emergency which must be sustained by the party attempting to justify under it, in order to prevail.

It is, of course, true that any large community, growing in population, finds itself requiring more water from time to time to supply its inhabitants. So long as the state can confine itself to its own resources, it can be very liberal in authorizing such a community to take additional water supplies for such purpose. When, however, they find it expedient to take the water supply of other states, the same degree of liberality does not apply.

We do not concede that an emergency or necessity has any sound justification in law for authority to take property belonging to a neighboring state. The theory depends for its force upon the idea that there is some good reason why an unlimited number of people should continue to reside in one portion of the state or section of the country. Historically, this principle has not proven true. The progress of civilization has rather come from the continued development of new territory. There is nothing in the history of law which would indicate that there has ever been any objection to people seeking the benefits of nature's resources where they are located rather than attempting to have natural resources brought by artificial means to one particular locality.

The commonwealth of Massachusetts very forcefully impresses upon its own people the futility of expecting to live in

any one place, even though that place be the choice of its people. The Swift river act which provides for the obliteration of four towns and parts of seven others; showing that there is apparently nothing inherent against compelling people to move from one place to another, which, of course, would obviate any necessity or emergency.

Unless this be so, there would be nothing to prevent one state from consuming its own resources and all those of a neighboring state, in order that it might expand to an unlimited extent. We do not understand that the Commonwealth of Massachusetts goes this far. There seems to be a theory that it can take the resources of a neighboring state so far as the other state is not in immediate need of them, or so long as the neighboring state or its citizens will not be materially damaged by the present loss of these resources.

The difficulty about this proposition is that the future growth of the Commonwealth of Massachusetts would be predicated upon the resources so taken. If, in the future, a growth of population and consequent need appears in the State of Connecticut that state would be confronted with a limitation as to its ultimate growth because of the fact that a portion of its resources had already been taken by the Commonwealth of Massachusetts. Must it limit its growth in this respect, or is it possible, when that point is reached, to compel Massachusetts to return these borrowed resources? If that is done, what will happen to the increased growth which has been based upon these resources in Massachusetts? If they must be returned, then the added growth which has been built up because of these resources must disintegrate, because, if they are necessary to the continued life of the community, when they are taken away some portion of the community must move to a different section in order to live.

Concededly the present additional water supply required by Massachusetts will be sufficient for only a limited period of time. If the community involved grows as it is expected to grow, a few years from now it will be faced with the same necessity and emergency as it is now claimed confronts it; more water will be needed. It is impossible to continue to take water from a neighboring state without at some point causing material damage. If it is claimed that water cannot be taken if material damage is caused thereby, then it is conceded that there is a point at which development must cease. If that be so, then to allow water to be taken at the present time is only the first step in the building up of a fictitious belief that the community can grow to an unlimited extent. *If it can be limited at any one time, it should be limited when it first attempts to take the resources of a neighboring state.*

Should the state desiring to take water predicate its demand upon showing that it has exhausted all of its available supply? There is no claim in the defendant's answer that it has exhausted all the supplies existing in eastern Massachusetts. We presume this court will take cognizance of the geography of eastern Massachusetts where there appear a number of water supplies which do not involve interstate questions.

If it be claimed that some of these streams are at the present time polluted to such an extent that they are not available for water supply, is it too much to ask that the Commonwealth of Massachusetts purify them so that they can be used for that purpose? The Commonwealth of Massachusetts has ample power as a sovereign to accomplish this result. We believe that it is fair that this should be done before seeking to take the water supplies belonging to the State of Connecticut. Is it incumbent upon the Commonwealth of Massachusetts to show that it has developed all existing supplies in eastern Massachusetts

as a pre-requisite to claiming the property of a neighboring state, because of an emergency or necessity?

These are all questions which must become of vital importance if any consideration is to be given the defense of necessity to this action. They portray in a very small measure the intricate questions which are bound to arise should this court consider the claims of law and equity proposed by the defendant.

The problems which we have suggested are not judicial problems. They are the political problems of government. Whether one section of a state is to thrive at the expense of another section of the state is a matter for the legislature of the state to determine. We can find no cases in which the court has undertaken to solve this problem for a state. Nor do we believe that this court should be asked to determine a question of this character as between two states. And yet, if the problem under discussion is ever recognized by this court, it must be faced sooner or later with the determination of whether the communities of one state shall be given preference over the communities of another state. It is something of this sort which we think this court had in mind in the case of *Wisconsin, et al., v. the State of Illinois and the Sanitary District of Chicago, 278 U. S., 367*, when it stated one of the claims of the complainant states to be:

> "and third, that the injuries to the complainant states deprive them and their citizens and property owners of property without due process of law and of the natural advantages of their position, contrary to their sovereign rights as members of the Union."

In this case, after finding that the federal permits were without legal basis, the injunction sought by the complainant states was granted by this Court.

In *paragraph 16* (pages 10 and 11) of *complainant's motion to dismiss the defendant's answer*, the complainant objects, as a matter of law, to the sufficiency of emergency and necessity as a justification. Also, in *paragraph 3* (pages 8 to 12) of *complainant's motion to strike out certain parts of the defendant's answer*, those portions of the answer which undertake to raise the question of necessity and emergency as a defense are objected to as a matter of law and the complainants ask that they be stricken out.

IX. JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

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In the case of *Kansas v. Colorado* (185 U. S., 125) this court said:

> "Sitting, as it were, as an international, as well as a domestic tribunal, we apply federal law, state law, and international law, as the exigencies of the particular case may demand."

And in the same case (206 U. S., 46) the court further said:

> "In other words, through these successive disputes and decisions, this court is practically building up what may not improperly be called interstate common law."

It has further been intimated in some of the cases that, inasmuch as many questions arising between states are of a character which, as between nations, would be the subject of diplomatic negotiations, that this power also may have been confided in this court inasmuch as the states are prevented from dealing with questions of a diplomatic character.

Article III, Section 1, of the constitution of the United States provides:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

Article III, Section 2, of the constitution of the United States provides:

> "The judicial power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; to all cases affecting Ambassadors, other Public Ministers and Consuls; to all Cases of Admiralty and Maritime Jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a State and the Citizens of another State; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a State, or the citizens thereof, and foreign states, citizens or subjects."

1. *Federal law*

Under *article III, section 2, of the Constitution of the United States*, whenever controversies between states involve any provision of the Constitution of the United States, the laws of the United States, treaties made or which shall be made under their authority, or cases affecting ambassadors or the public

ministers and consuls, and cases involving admiralty and maritime jurisdiction, they are questions of federal law, and of course in such case it is the federal law which governs.

This law is to be applied, and has been applied, in those cases where the navigability of interstate streams is involved. Navigation being an incident to the interstate commerce provisions of the constitution, it necessarily follows that questions relating to this subject are to be determined by the federal law, whether the case involves a controversy between two or more states or between individuals.

2. *State law*

The general rule of this court is laid down in the case of *Bank of United States v. Daniel*, 12 Pet., 32, which provides:

> "This court, in accordance to a steady course of decisions for many years, feels it to be an incumbent duty carefully to examine and ascertain if there be a settled construction by the state courts of the statutes of the respective states, where they are exclusively enforced; and to abide by and follow such construction when found to be settled."

In *Kansas v. Colorado*, 206 U. S., 46, in determining the question in issue, the court said:

> "And here we must notice the local law of Kansas as declared by its Supreme Court, premising that the views expressed in this opinion are to be confined to a case in which the facts and the local law of the two states are as here disclosed."

3. *International law*

In the case of *Virginia v. West Virginia*, 220 U. S., 1, it is suggested that in dealing with cases arising between states, it is dealing with a quasi international controversy. In this sense it

may be that the principles applicable to international law may be applied to controversies between two or more states. In the recent case of *Wisconsin v. The State of Illinois and the Sanitary District of Chicago*, 278 U. S., 367, it was claimed upon behalf of the defendant that, although all of the states involved in the controversy were common law riparian ownership states, under international law, common law doctrines should not avail against the diversion of the waters from the Great Lakes by the defendants. This claim, however, must have been overruled by this court, because the prayer for relief by injunction restraining the diversion of these waters was sustained and the injunction granted, and the case referred to the master for a determination as to the period of time necessary to complete the return of the waters to the Great Lakes.

The relative position of the so-called Lake States and the State of Illinois was no different from the relative position of the State of Connecticut and the Commonwealth of Massachusetts in this action. The Lake States claimed that the State of Illinois and the Sanitary District of Chicago had no right to divert any of the waters of the Great Lakes. This court sustained the position and granted the injunction except so far as a small diversion for the purposes of the navigation of the port of Chicago was authorized.

4. *Interstate common law*

As we have already suggested, in the case of *Kansas v. Colorado*, reported in the 206 U. S., pages 46, 95, this court intimated that there had grown up through a series of decisions by this court, interstate common law, to be applied by this court in cases between states as they might arise.

The definition of common law, as stated by Blackstone in his Commentary, is that it is a rule of conduct which has existed since the memory of man runneth not to the contrary. This, of

course, cannot mean that a new principle of law may be injected as common law by either state, or as applicable to controversies between the states, but must necessarily be the result of a long continued practice acquiesced in by substantially all those interested in the subject of the controversy.

If there is one common law rule which has been consistently followed by this court for a length of time sufficient to be denominated interstate common law, it is the rule that where this court determines the laws of the states involved in the controversy to be substantially the same, this is the law which is followed by this court in the particular case before it.

In the case of *Kansas v. Colorado*, 206 U. S., 46, although the court covered a great deal of ground in a general discussion of the powers of this court in cases of this character, the real decision of the case is based upon the statement that—

> "As Kansas thus recognized the right to appropriate the waters of a stream for purposes of irrigation subject to the provisions of an equitable division between the riparian proprietors, she cannot complain if the same rule is administered between herself and a sister state."

In other words, the court, having found that Kansas recognized the rule of appropriation of waters, and Colorado enforced a like rule, that this common rule should be adopted by this court as the rule for determining the issues between the two states.

In the case of *Wyoming v. Colorado*, 259 U. S., 419, the court, having found that the same rule of law was in force in each of the two states then before the court, it applied the common rule in reaching its decision upon the controversy presented to it by those states.

In *3 Enc. U. S. Reports*, page 970, it is stated:

> "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes; but general common law exists throughout the United States, not, it is true, as a body of law distinct from the common law in force in the states, but as containing the general rules and principles by which all transactions are controlled, except so far as those rules and and principles are set aside by express statute. Hence, when a common law right is asserted, the laws of the state in which the controversy originated must be looked to."

In those cases which have come before this court concerning boundary lines between states, the sole question before the court has been the determination of the proper boundary line between the two states involved. There has been no difference between the action of this court in determining the boundary line between two states, and the courts of any one of the states in determining the boundary line between the property of two of its citizens. No attempt has been made to divest either state of property to which it was entitled and to give it to the other. It has simply been a question of determining the true line.

This was illustrated in the case of *Louisiana v. Mississippi*, 202 U. S., 1, where the court said:

> "The islands, marsh or otherwise, claimed by Louisiana in this case, were all within three leagues of her coast. The act admitting Mississippi was passed five years after the Louisiana Act, yet Mississippi claims thereunder the disputed territory as being islands within eighteen miles of her shore. If it were true that this repugnancy between the two states existed, it is enough to say that Congress, after the admission of Louisiana, cannot take away any portion of that state and give it to the state of Mississippi."

The fundamental principle in this case is no different than where one property owner has acquired property by deed and his neighbor thereafter has acquired a portion of the same property from the same grantor. The court, in such a case, would necessarily be bound to apply the rule that the grantor exhausted his powers of alienation when he made the first grant, and that the property of the first grantee could not be taken away and awarded to the second grantee.

In the case of *Wisconsin v. The State of Illinois and the Sanitary District of Chicago,* 278 U. S., 367, all of the Lake States, so-called, and the state of Illinois were common law riparian ownership states. According to the claims of the Lake States, as set forth in substance in the reported opinion of this case, they asserted that as riparian owners, and as representatives of their people that they were entitled to the waters of the Great Lakes as nature provided them; and that the State of Illinois and the Sanitary District of Chicago had no right to divert any of these waters for municipal purposes of the Sanitary District.

They further claimed that no legal authority was conferred by the legislative act of the State of Illinois authorizing the diversion. To protect the Lake States against this diversion an injunction was granted by this court as prayed for. It is apparent from the digest of claims, as they appear in the reported decision, of both the Lake States and the state of Illinois and the Sanitary District of Chicago that these states were at issue as to the rights of the respective states to establish and enforce the common law doctrine of riparian ownership within their own borders. To have granted the injunction prayer for in this case, it was necessary for this court, having found that the federal authority was insufficient as a legal basis for the diversion, to have come to the conclusion that the claims

of the Lake States were correct, and that no authority was vested, either in the State of Illinois or in any other place or in this court, to authorize or permit a diversion of the waters of the Great Lakes as against the objections of the Lake States.

5. *Diplomatic settlements*

In *Missouri v. Illinois* (200 U. S., 496; 180 U. S., 208) it is suggested:

> "Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would devolve the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions which we are considering".

The constitutional provisions which were being considered were those relating to the powers of this court. We do not understand by this language that it is within the province of this court to determine questions arising between the states, which, if they were independent sovereignties, might be adjusted by diplomatic discussion between the two states, but rather that where a situation arises that one state is being deprived of its rights as a sovereign power, and where under ordinary circumstances, as a nation, they must make war to protect each other, there is a substitute for this right to make war, and it is to this court that the power is given to protect the the rights of such states. This, we believe, is as far as this court can go.

6. *No power to legislate*

In the case of *Missouri v. Illinois,* 200 U. S., 496, this court said:

> "Therefore, if one state raises a controversy with another, this court must determine whether there is any

> principle of law, and, if any, what, on which the plaintiff can recover, but the fact that this court must decide does not mean, of course that it takes the place of a legislature."

7. *Judicial power*

Article III, section 2, of the Constitution of the United States, so far as it applies to this case provides:

> "The judicial power shall extend . . . . . to all controversies between two or more states."

The subject of this sentence is the judicial power, not controversies between states. It places such controversies in the same classification as it does a number of other controversies involving the federal constitution; federal laws, treaties, ambassadors, public ministers, consuls, admiralty, and maritime questions, citizens of different states, foreign states, and their citizens or subjects.

The fact that the parties to this action are states, clothes this court with no greater judicial powers, nor with any other governmental power, than if the parties were individuals.

In *Kansas v. Colorado,* 206 U. S., 46, it is said:

> "Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the supreme and other courts, all the judicial power which the nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a judicial nature arising within the territorial limits of the nation no matter who may be the parties thereto."

The judicial power of the United States was a delegated power from the states. It necessarily follows that the judicial power of the United States is no greater and can be no greater than the judicial power of the states from whence the powers were derived. As stated in *Kansas v. Colorado*, "the creature cannot rule the creator". (*Kawananakoa v. Polyblank, Trustee*, etc., 205 U. S., 349.)

In *paragraph 3* (pages 8-12) of the *complainant's motion to strike out certain parts of the defendant's answer*, there appear lengthy quotations from various parts of the defendant's answer, which undertake to set up the doctrine that notwithstanding the fact that the Commonwealth of Massachusetts is not authorized, by the acts of its great and general court, to take the property of the State of Connecticut and of its citizens located within the State of Connecticut, yet there exists a situation which is of sufficient importance to authorize this court to sanction a diversion of the waters of the Ware and Swift Rivers, under its power to determine controversies between two or more states of the union.

It is apparently claimed that, because a grave necessity and emergency exists within the Commonwealth of Massachusetts for an increased water supply for the eastern section of the Commonwealth, that this in itself is sufficient to warrant this court in interposing its great powers, and permitting the diversion to take place, by refusing to the State of Connecticut the injunction which it seeks. The complainant asks that these claims be stricken from the record because they present to this court a prayer which it is without power to grant. The same question is raised in *paragraph 16* (pages 10 and 11) of the *complainant's motion to dismiss the defendant's answer*, the complainant claiming that this proposed defense of the Commonwealth of Massachusetts is not sufficient in law and that

this court is without power to recognize and give effect to such defense.

Both of these motions are based upon *article XIV of the amendments to the Constitution of the United States,* which provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of . . . . property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The affirmative defense of the Commonwealth of Massachusetts sets forth a new principle which has never before occupied the attention of this court. It is impossible to consider the allegations of necessity and emergency, as set forth in the defendant's answer, as pertaining to the two legislative acts of the Commonwealth of Massachusetts relating to the taking of the waters in question. We have already discussed the inability of the Commonwealth to enact laws which are effective beyond the geographical limits of the Commonwealth of Massachusetts. To be of any force, the claim of necessity must be considered as being alleged as a substitute for the authority which these acts have within the Commonwealth of Massachusetts, and the authority for the application of the same rights on the part of the Commonwealth to property within the State of Connecticut.

To determine the sufficiency of this claim it is necessary to first consider the nature of the power which the defendant seeks to have recognized and enforced by this court. The purpose in view is the taking of private property belonging to the State of Connecticut and its citizens, located within the State of Connecticut. Concededly the use for which the property is desired is a

public use. The property which is sought to be taken is private property. It is a fundamental rule that private property cannot be taken for public use without the exercise of the prerogative right of eminent domain. In effect the proposition is that the defendant asks this court to sanction the taking of private property for a public use purely because of the necessities of a large, municipal subdivision of the Commonwealth. It is claimed that there must be some authority authorizing the Commonwealth to take the waters when it is impossible, owing to the physical location of the property, to exercise the power of eminent domain by the Commonwealth of Massachusetts.

As we have already shown, the power to take private property for public use is a legislative function of government; and this court has already held that it has no legislative powers. It is claimed, however, on the part of the defendant, that the ordinary rules which apply in the case of individuals will not be the sole consideration for this court in determining the relative rights of states; that when states are at issue before this court, it has the power to determine the comparative interests of the two states as to the use of the waters in said stream, and award judgment as in its opinion justice may require, irrespective of the technical rights which obtain between individuals in the two states.

The states, in granting or delegating judicial powers to the United States, only extended such judicial powers as applicable to other delegated powers of the United States. The delegated judicial power was certainly no greater than the state judicial power originally. If a judicial question presented is one which a state court would be without power to determine because it is a legislative or executive matter, then this court has no greater power. For instance, if a state court cannot substitute its judgment for the exercise of the power of eminent domain by legislative act, then this court is likewise limited. Suppose the Metropolitan District needed additional water for domestic

purposes; and felt that the waters of the Ware and Swift rivers was its best supply; but that no legislative act of the Commonwealth had been enacted authorizing the taking of these waters; a property owner, a riparian owner on one of these streams instituted an action in the courts of the Commonwealth asking for an injunction to restrain the taking; the District defended by saying we have a great need of water and this supply is the best one we can get; these facts are sufficient and it is not essential that we have a legislative act. Could the court in such case refuse the injunction?

The Commonwealth of Massachusetts may say to the cities of Springfield, Holyoke and Chicopee, as they have already said to a number of towns, your usefulness to the state as communities has ceased. We will decree that you are to be wiped out. Your inhabitants can continue to live in your ancestral homes and drown or you can move to some other thriving community.

This is a sovereign prerogative of the Commonwealth over its own citizens. So long as compensation is provided for, those communities and their citizens can obtain no relief upon an appeal to this court. The determination of this policy is a part of the political problem of government and its wisdom cannot be reviewed by this or any other court. Courts can only recognize that a qualified department of government has acted, and if it be found that the act was lawful, can interfere only to aid in the execution of the policy decreed.

But when the Commonwealth undertakes to extend this policy to a neighboring state, then it is the duty of this court, upon application, to invoke its authority to prevent such acts. The present and future of the City of Hartford should not be subject to the whims or policy of any sovereignty other than the State of Connecticut. It has a right to know that the resources provided by nature are to remain undisturbed unless Connecticut shall see fit to provide otherwise.

The problems pertaining to the natural resources of a state can only be solved by its legislative department of government. This is true as to state courts. Suppose a state court is confronted by the desire, based perchance upon absolute necessity, of a large and growing municipality for an additional water supply. Can it, in the absence of legislative enactment, authorize a taking of the necessary water? It is true that the issue is one proper for the court to pass upon. But its decree must be based upon its judicial powers and in such a case, the court would be limited to restraining an illegal taking of property. It could not authorize such taking, nor refuse to restrain it.

To put the case differently. Suppose the inhabitants of the seven towns of Massachusetts to be removed from existence asked this court for relief, or suppose an inhabitant of Connecticut owning property in the seven towns sought relief in the federal courts from the edict of the Commonwealth that such property is needed for the future of Boston. Could this court weigh the relative interests of Boston and these seven towns and decide that it was of more importance to the country that they should remain in existence and restrain the operation of the act of the Commonwealth? No. The sovereignty of Massachusetts having spoken, this court is bound to recognize its act and aid in its enforcement regardless of what it may think of the wisdom of the action.

By the same token, if the sovereignty undertaking to speak has not the authority, it is equally the duty of this court to prevent the act contemplated, regardless of its opinion that the desired project would be of benefit to mankind.

Every sovereignty, whether it be a nation or a state, finds itself with the resources which nature has provided it. They may be more or less than desired. They are in fact limited. It is the right of every such sovereign to use them as nature has provided

them or to develop them as time and science may suggest, to their fullest extent. The ultimate use may be in their natural state or it may be as man has undertaken to control and aid nature in such development, or it may be both. Whichever is followed, or if both are undertaken, it is the right of the sovereign to say when, in what manner, and how such natural resources are to be handled. This court has said, in the case of navigation, that one hundred years is not a long period in the life of a nation; that merely because navigation has not been developed during that period does not affect the navigability of the stream; and that the stream must continue to be considered as navigable. *Economy Light & Power Co. v. United States, 256 U. S., 113.* How much more reason is there to preserve and protect the waters of a stream when considering their use in a much broader aspect. Navigation is but one of many uses to which flowing water may be devoted.

The riparian owner of property is protected against any taking of his riparian rights except by due process of law. This means a legislative act under the inherent power to take private property for public use through the exercise of the power of eminent domain. If the constitutional provision guaranteeing him such protection is of any force, his rights are secure until his sovereign has taken his property through the medium of a legislative act. Why should he be protected from his own sovereign but at the mercy of a neighboring state which desires his property? Why shouldn't the same principles of law obtain in both instances.

If the courts of Connecticut and Massachusetts are restricted to the enforcement of a legal and valid legislative act authorizing a taking for public use, then this court is similarly limited to a taking authorized by a competent legislative body. Where is there a legislature with competent legal authority to empower such a taking as between states?

8. *Serious magnitude of question involved*

In *New York v. New Jersey and the Passaic Valley Sewage Commissioners*, 256 U. S., 296, this court has said:

> "Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence. *Missouri v. Illinois*, 200 U. S., 496."

One of the claims which the defendant makes in its brief (page 3) is that the insignificance of the contemplated diversion is such as to bring it within the scope of *de minimis non curat lex*. As a vivid picture of this principle, the defendant has seen fit to insert opposite page 56 of its brief, pictures of the Ware and Swift Rivers, although they state on page 58:

> "We do not offer these photographs as having any evidential value. They are submitted purely as a chalk to emphasize our argument that this case involves primarily questions of fact."

Nevertheless it is difficult to inspect these photographs without raising the question in the mind of the court as to the importance of the diversion of these streams. Whatever may be the impression gained from looking at them, the fact is admitted that these are the waters which are to supply for the next substantial period of years the present population of about two million, which it is alleged in the defendant's answer is expected to increase during the next decade or two in proportion to its past growth. Although the amount of water which is apparent in these two pictures is seemingly small, the Commonwealth of Massachusetts has sufficient confidence in the value of these two small streams to feel that the taking of these waters will warrant an expenditure of $65,000,000. To provide for the storing of these waters and their transmission ulti-

mately to the Metropolitan District of Boston, the admitted plans include an aqueduct or tunnel, 25 miles in length from the Wachusett Reservoir to the Swift Reservoir, 12 feet, 9 inches in diameter, and with a capacity of 500,000,000 gallons of water a day. The Swift Reservoir, which is to hold these waters, will occupy territory 39 square miles in area, and will have a storage capacity of 410,000,000,000 gallons. This proposed reservoir, when completed, will be six times the size of the Wachusett Reservoir and will hold six times the amount of water capable of being stored in the latter. To accomplish these objects, the acts of the great and general court of the Commonwealth of Massachusetts, provide for the elimination of four ancient towns entirely and the partial elimination of seven others.

H. D., 1550 Mass., 1922.

9. *Equity*

This case was brought under the equity jurisdiction of this court. The invasion of a right has been alleged, and this court is asked to enjoin the acts of the defendant constituting such an invasion of right.

The defendant claims that there is adequate remedy at law, because any injury which may be occasioned by the taking of these waters can be compensated by money damages. As to claims of this character, in *Georgia v. Tennessee Copper Co., 206 U. S., 230, 237,* this court said:

> "Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not likely to be required to give up quasi-sovereign rights for pay; and apart from the difficulty of valuing such rights in money, if that be its choice, it may insist that an infraction of them shall be stopped."

And in Missouri *v.* Illinois, 200 U. S., 496, it is said:

> "Can it be gravely contended that there are no preventive remedies by way of injunction or otherwise, against injuries not inflicted or experienced, but which would appear to be the natural results of acts of the defendant, which he admits or avows it to be his intention to commit?"

In *paragraph 5* (page 14) of *complainant's motion to strike out parts of the defendant's answer,* a portion of the answer, in which it is claimed that large sums of money have been expended in preparation, restoring and diverting waters of the Ware and Swift Rivers, is objected to as a part of any defense to this action. The amount which has been expended in this case is probably but a small percentage of the amount spent by the Sanitary District of Chicago in diverting the waters of the Great Lakes for domestic purposes; but in that case it will be recalled that the amount expended formed no part of a valid defense to the action, and an injunction was granted in spite of the expense involved.

X. INTERSTATE COMPACTS

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1. *Constitutional provisions*

Article I, Section 10, of the Constitution of the United States, provides:

> "No state shall, without the consent of Congress, ... enter into any agreement or compact with another state . . . . "

It is significant that this provision of the Constitution appears under the heading of the legislative powers of the government of the United States. It is part and parcel of the *first provision of Article I,* which provides:

> "All *legislative powers herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Italics are ours.)

So that one of the legislative powers granted by the states in Article I is the right to participate in and have the final approval as to any compacts or agreements entered into by the States.

2. *What governmental rights are subject to compact*

In the case of *Kansas v. Colorado,* 206 U. S., 46, in discussing the rights of the states, this court said:

> "It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the west, of the appropriation of the waters for purposes of irrigation, shall control. Congress cannot enforce either rule upon any state."

And again, in the same case, when it was urged that some sort of compensatory water or benefit be furnished by the State of Colorado to the State of Kansas, this court said:

> "That would be equivalent to this court's making a contract between two states, and that it is not authorized to do."

In the case of *Louisiana v. Texas,* 176 U. S., 1, 16, which was cited at some length in the case of *Missouri v. Illinois,* 180 U. S., 208; 200 U. S., 496, this court said:

> "Controversies between them arising out of public relations and intercourse cannot be settled either by law or diplomacy, though, with the consent of Congress, they may be composed by agreement."

3. *The making of a compact is a legislative act and not a judicial act*

The quotations from the decisions of the Supreme Court follow the set up of the national Constitution. They recognize that subjects of compact which have to do with the property rights of the several states are matters which can only be decided, and best be decided, by the legislative acts of the two states involved.

In *New York v. New Jersey and the Passaic Valley Sewage Commissioners,* 256 U. S., 296, this court suggested, in dismissing the complaint of the State of New York (page 313):

> "We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing population living on the shores of New York bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it, than by proceedings in any court, however constituted."

4. *Control of the United States over terms of compact*

The consent of the United States to agreements or compacts among the several states relating to interstate waters is of neces-

sity limited to such interests as the United States has under the Constitution. Unless it has some interest in the navigability or the navigable capacity of a stream, the United States has no jurisdiction. When, however, a navigable stream is affected or may be affected, or the navigable capacity of a stream is affected or may be affected, then the interests of the United States attach, and the authority of Congress must be obtained to make the compact or agreement a valid one.

5. *Policy as to compacts concerning water rights*

The control of the waters of interstate streams by the states through which the stream flows has been recognized by Congress in a number of acts which have been passed relating to this subject. These acts have all recognized that the disposition or the allocation of the waters of interstate streams should be determined in the first instance by the legislatures of the states involved; and under our constitutional provisions any agreements or compacts entered into by the states must be ratified and approved by the Congress of the United States. The following are some of the acts which have been passed by Congress, either authorizing interstate compacts concerning this subject matter or approving compacts already made.

Act of August 8, 1917 (40 Stat., 266, sec. 5). Minnesota and North and South Dakota authorized to make agreements for the improvement of navigation and control of floods on boundary waters and tributaries.

Act of April 8, 1918 (40 Stat., 515). Oregon and Washington, protection of fishing in the Columbia River, etc. (Agreement ratified.)

Act of July 11, 1919 (41 Stat., 158). New York and New Jersey construction of tunnel under Hudson River; consent to agreements authorized by New Jersey and New York.

Joint Resolution of March 4, 1921 (41 Stat., 1447). North and South Dakota, Minnesota, Wisconsin, Iowa and Nebraska; jurisdiction over boundary waters; agreements authorized.

Act of August 19, 1921 (42 Stat., 171). Arizona, California, Colorada, Nevada, New Mexico, Utah and Wyoming; apportionment of waters of Colorado River and its tributaries; agreement to be made by January 1, 1923, subject to approval by legislature of each state concerned, and by Congress.

Joint Resolution of September 22, 1922 (42 Stat., 1058). Kansas and Missouri, development of water works plans for Kansas City, Kans., and Kansas City, Missouri; agreement approved.

Act of January 29, 1925 (43 Stat., 796-798). Colorado and New Mexico; distribution of waters of La-Platte River, compact approved.

Act of March 4, 1925 (43 Stat., 1268). Washington, Idaho, Oregon and Montana; apportionment of water supply of Columbia River and its tributaries; agreement to be made by January 1, 1927, subject to approval by legislature of each state and by Congress.

Act of March 8, 1926 (44 Stat., 195). Colorado and Nebraska; apportionment of waters of South Platte River; agreement approved.

Act of April 13, 1926 (44 Stat., 247, C. 129). Extension of time for agreement by Washington, Idaho, Oregon and Montana, under Act of March 4, 1925, to December 1, 1927.

Act of July 3, 1926 (44 Stat., 831, C, 754). Idaho, Wyoming, Washington and Oregon; apportionment of waters of Snake River; agreement authorized, subject to ratification by Congress.

Act of February 26, 1927 (44 Stat., 1247, C. 216). South Dakota and Wyoming; apportionment of waters of Belle Fourche and Cheyenne Rivers; agreement authorized by ratification by Congress.

Joint Resolution, March 3, 1927 (44 Stat., 1403, C. 382) Provisions of Act of March 4, 1925, Washington, Idaho, Oregon and Montana, as to apportionment of water supply of Columbia River and its tributaries extended to December 31, 1930.

Act of March 2, 1929 (45 Stat., 1502, C. 520). An Act granting the consent of Congress to compacts or agreements between the states of Colorado and New Mexico with respect to the division and apportionment of the waters of the Rio Grande, San Juan, Las Animas Rivers and other streams in which such states are jointly interested.

Act of March 2, 1929 (45 Stat., 1502, C. 521). Granting the consent of Congress to compacts and agreements between the states of New Mexico, Oklahoma and Texas with respect to the division and apportionment of the waters of the Rio Grande, Picos and the Canadian or Red Rivers, and all other streams in which such states are jointly interested.

Act of March 2, 1929 (45 Stat., 1503, C. 522). Apportionment of the waters of the Cimarron River and all other streams in which the states of New Mexico and Oklahoma are jointly interested.

Act of March 2, 1929 (45 Stat., 1517, C. 538). An act granting the consent of Congress to compacts or agreements between the states of Colorado, Oklahoma and Kansas with respect to the division and apportionment of the waters of the Arkansas River, and all other streams in which such states are interested.

6. *Sovereign must consent to taking*

Sovereign rights can only be divested by the voluntary act of the soverign. This may be accomplished in a number of dif-

ferent ways under our form of government. So far as powers have been delegated to the United States, such rights as are necessary to carry into effect such powers have been transferred to the United States by the States.. The ratification of the constitution effected the transfer. It was the voluntary act of the sovereign power of each State. Such act was that of the legislative branch of the government. It is the legislative branch which today must approve of all amendments to the constitution which may seek to delegate further powers to the federal government.

The legislature of a state may also by appropriate action, enter into agreement or compact with another state. But this agreement or compact must be approved by the legislatures of the states involved and by the legislative branch of the United States government. In no case is there any intimation that any department other than the legislative can so act.

Paragraph *thirteen* (Page 9) of the *complainants motion to dismiss the defendant's answer* objects to the legal sufficiency of the answer, because no where does it appear therein that the State of Connecticut has ever consented to the taking of any of the waters involved in this action.

In Hudson Water Company *v.* McCarter, 209 U. S., 349, it was said:

> "But is it recognized that the state, as quasi-sovereign and representative of the interests of the public has a standing import to protect the atmosphere and the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned."

And further—

> "It finds itself in possession of what all admit to be a great public good; and what it has it may keep and give no one a reason for its will."

In Georgia *v.* Tennessee Copper Co., 206, U. S., 230, this is said:

> "This is a suit by a state for injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

And in Kansas *v.* Colorado, 206, U. S., 46:

> "One cardinal rule underlying all the relations of the states to each other is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none."

With these pronouncements in mind, and the law of the two states recognizing the common law doctrine of riparian ownership; the courts of either state being powerless to take the property of one person and give it to another; both states recognizing that the use of water for municipal purposes is not an ordinary riparian use but one requiring the authority of the legislature to authorize; it would seem to be inevitable that this court must respect the judicial power recognized by the courts of the states, and leave the two states to an adjustment of the questions involved through the legislative power provided by the United States constitution, by way of interstate agreement or compact.

Respectfully submitted,

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In the
Supreme Court of the United States

OCTOBER TERM, 1929

ORIGINAL NO. 12

STATE OF CONNECTICUT
v.
COMMONWEALTH OF MASSACHUSETTS

IN EQUITY

REPLY TO DEFENDANT'S ANSWER AS AMENDED.

BENJAMIN W. ALLING,
Attorney-General of the State of Connecticut.

ERNEST L. AVERILL,
Deputy Attorney-General.
BENEDICT M. HOLDEN,
Special Counsel

THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

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1. The complainant denies all of the affirmative allegations of the defendant's answer as amended.

2. The complainant further says that there now exists in the Eastern part of the Commonwealth of Massachusetts a full and adequate supply of water susceptible of use for a domestic supply for the Metropolitan District and that there is no necessity now existing to divert waters from the watershed of the Connecticut River Valley to the Metropolitan District for such purpose.

THE STATE OF CONNECTICUT,

By BENJAMIN W. ALLING,
Attorney-General.

ERNEST L. AVERILL,
Deputy Attorney-General.
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